NO. 88-80

in the Supreme Court of the United States

OCTOBER TERM, 1988

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners

vs.

FRED STANTON SMITH, Trustee of the
Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether the Petition for Writ of Certiorari is moot in light of the opinion of the United States Court of Appeals for the Eleventh Circuit in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), which held the plan of reorganization is substantially consummated and no effective relief is available to the parties?

2. Whether the petitioners have standing to maintain this appeal on behalf of Twin Development Corporation?

3. Whether the Court of Appeals for the Eleventh Circuit and the United States District Court correctly applied the doctrine of equitable estoppel?

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*The statutes have been printed in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould") are two of five debtors[1] who filed voluntary petitions under Chapter 11 in August, 1984. The filing of these bankruptcy petitions followed the institution of foreclosure actions by Respondent Bank of New York ("bank") after the debtors defaulted on their obligations to the bank. The bank had financed construction of the "Miami Center Project," a hotel and office complex in Miami with a parking garage and shopping arcade (a5).[2]

Petitioner Gould is the sole shareholder and president of Petitioner Holywell, which in turn is the sole shareholder of Twin Development Corporation ("Twin"). In addition, Gould is the president, director and sole agent of Twin (a6; A 1).

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to the bank to secure Holywell's guaranty of the bank's construction loans to Holywell. Upon the debtors' default of their obligations to the bank and the resulting bankruptcy. Twin's stock became the "unfettered" property of the bank under the terms of the agreement between the bank and Holywell (a6).

Prior to the bankruptcy of its sole stockholder and its president, Twin had entered into a contract to sell real and

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[1]Debtors Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership in which Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership in which Gould and Miami Center Corporation are the general partners, did not appeal the bankruptcy court's order which is the subject of this appeal.

[2]Petitioners' appendix will be referred to as (a____). Respondent liquidating trustee's appendix will be referred to as (A____).

personal property owned by Twin and four limited partnerships, all controlled by petitioners Gould and Holywell (a6; a25). On October 22, 1984, the bankruptcy court entered an order upon motion of Holywell and Gould authorizing and approving the sale of this property, known as the Washington properties (a25). The bankruptcy court ordered Holywell and Gould to consummate the sale and to segregate the net proceeds due Holywell and Gould until further court order (a26). Gould testified during the course of the bankruptcy proceedings that Twin's share of the sale proceeds "has to go to Holywell as dividends" (a 10). In Gould and Holywell's motion filed in the bankruptcy court to authorize and approve the sale of Twin's Washington properties, the petitioners represented that

> Consummation of the transaction proposed herein is in the best interest of creditors in these proceedings in that immediate cash infusion from such sale which inures to Holywell and Gould will provide the *Debtors* with capital much needed as an essential part of the reorganization sought in these proceedings (emphasis added) (A 4).

Following the sale of the Washington properties, the bankruptcy court ordered Gould and Holywell to cause the net proceeds received by Twin, Holywell and Gould from the sale to be deposited into a segregated account, subject to further court order (a17-19). Neither the petitioners nor Twin appealed. In fact, Holywell and Gould deposited all funds received as sale proceeds.

Thereafter, the bankruptcy court entered a cash collateral order whereby all of the funds deposited by the petitioners and Twin were deemed cash collateral of the bank (A 6). Again, neither the petitioners nor Twin, which the petitioners entirely controlled, appealed that order.

Subsequently, the bank and the five debtors submitted proposed plans of reorganization. The bank's plan was funded in part by this cash collateral—the entirety of the proceeds from the sale of the Washington properties (a6-7). That aspect of the plan was revealed in the bank's disclosure statement (A 14).

The Holywell disclosure statement made it clear to the bankruptcy court and all creditors that the cash proceeds derived from the sale of the Washington properties accruing to Twin would be available to pay creditors (A 10-13; a10). The petitioners also filed certificates with the bankruptcy court regarding their plans of reorganization in which the petitioners stated the funds due Twin from the sale would be used to pay creditors (a10).

The creditors overwhelmingly approved the bank's plan, and the bankruptcy court confirmed the bank's Amended Consolidated Plan of Reorganization, which expressly included the entire proceeds from the sale of the Washington properties. The United States District Court for the Southern District of Florida affirmed the order of confirmation, as amended after remand, and the United States Court of Appeals for the Eleventh Circuit dismissed the five debtors' appeal as moot because no stay was in effect,[3] the plan was substantially consummated and the court could not grant meaningful relief. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). In June, 1988, the five debtors filed petitions for writs of certiorari and mandamus in this Court, case numbers 87-1988 and 87-1989, directed to the Eleventh Circuit and the bankruptcy

[3]The bankruptcy court ordered a stay of the implementation of the plan upon the posting of a $140 million bond. There were over 400 creditors and claims of approximately $350 million. Although the district court reduced the bond to $50 million, effective for ninety days, the debtors did not post a bond and the plan became effective on October 10, 1985.

court. Respondent Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust ("liquidating trustee"), and the bank have filed briefs in opposition to those petitions, and the matters pend before the Court. Twin never objected to the bank's plan and never appealed the order of confirmation.

The plan provided for the substantive consolidation of the debtors and the creation of the Miami Center Liquidating Trust, which was funded by all of the debtors' 11 U.S.C. Section 541(a) defined assets (A 17), and by the Washington proceeds, including the sums due Twin from that sale.

Several months after the plan was confirmed and implemented, and with no stay in effect, Gould filed an emergency motion with the bankruptcy court for clarification regarding the ownership and control of two United States Treasury Bills held in the name of Twin, account no. 0002842207 at Florida National Bank of Miami, and having a par value of $13,949,000. The bankruptcy court entered an order in which it determined that the liquidating trustee was the sole party entitled both to direct Florida National Bank of Miami to cash the treasury bills at issue, and to distribute the funds in accordance with the terms of the confirmed plan (a15-16). Gould and Holywell appealed that order. Twin did not. The district court affirmed (see opinion at a5), as did the Eleventh Circuit (see opinion at a3), which also denied Gould and Holywell's petitions for rehearing and rehearing *en banc* (see opinion at a1). The Eleventh Circuit, in affirming the district court, held:

> The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous (a3).

Twin never appealed the bankruptcy court's order regarding the proceeds from the sale of the Washington properties held at the Florida National Bank of Miami, nor did it seek to intervene in the appeal which was filed. Lastly, Twin is not a party to the instant petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The district court correctly applied the doctrine of equitable estoppel, for the debtors repeatedly represented to the bankruptcy court and to their creditors that Twin's portion of the proceeds from the sale of the Washington properties would be available to pay creditors of the debtors. The failure of the bank and the liquidating trustee to plead the doctrine of equitable estoppel in response to Gould's emergency motion is inconsequential, for under the applicable Bankruptcy Rules no response, including affirmative defenses, was required absent a court order, and there was no court order to do so. Moreover, the bank thoroughly briefed the elements of the doctrine of equitable estoppel in its answer brief filed with the district court. That court had discretion to consider all issues presented in the record.

The petitioners' arguments regarding substantive consolidation are entirely irrelevant in light of the Miami Center Liquidating Trust's right to Twin's share of the funds, as conferred in the confirmed plan.

The petitioners lack standing to maintain this appeal. They seek to enforce the alleged rights of a third party rather than their own rights, in derogation of well settled law. More importantly, the Miami Center Liquidating Trust, not Holywell, now controls Twin's stock in accordance with the plan of reorganization.

Lastly, this petition for writ of certiorari is moot in light of the fact that, as no stay was in effect, the plan has been implemented and the "Twin monies" were commingled with other cash and used to pay creditors pursuant to the plan. No effective relief is available to the petitioners who would not be due the money in any event, unless and until the plan provisions have been carried out.

ARGUMENT

I.

THE DISTRICT COURT'S APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL WAS ENTIRELY PROPER

The district court's application of the doctrine of equitable estoppel was proper under the circumstances of the appeal.

A.

The District Court held authority to base its decision on the doctrine of equitable estoppel

The petitioners' contention that the district court could not premise its ruling on the doctrine of equitable estoppel because estoppel was not pled at the bankruptcy court level is without merit, for Gould's request for clarification as to the ownership rights to the proceeds in Twin's account at Florida National Bank of Miami was brought as an emergency motion to which no response was mandated except as required by court order.

Gould's emergency motion was not brought as an adversary proceeding. His request for clarification was governed by Bankruptcy Rule 9014, which provides:

CONTESTED MATTERS

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. *No response is required under this rule unless the court orders an answer to a motion.* The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. *The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.* An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. *The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable* or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order. 11 U.S.C. Section 9014 (emphasis added).

The bankruptcy court never required the bank or the liquidating trustee to answer the motion, nor did the court direct that any of the other rules contained in Part VII of the Bankruptcy Rules be made applicable to the proceeding.

The petitioners complain that the Eleventh Circuit, by affirming the district court, "has vitiated rules of procedure promulgated by this Court and significantly departed from

accepted standards of review" (petition for writ of certiorari, p.21). The only aspects of the law "vitiated" by the petitioners' argument are the rules governing bankruptcy proceedings, for in their analysis the petitioners entirely ignore the Bankruptcy Rules. Gould filed an emergency *motion*, not an adversary complaint,[4] and motions are governed by Bankruptcy Rule 9014. Rule 9014 incorporates a number of rules relating to adversary proceedings, but it does not include Rules 7008 or 7012, which would have required the liquidating trustee or the bank to file a responsive pleading containing affirmative defenses. This specific exclusion is consistent with Rule 9014's express provision that no formal response is required unless the court orders one. Notably, the petitioners do not argue that Bankruptcy Rule 9014 is unconstitutional. They simply ignore it and its effect.

The bankruptcy court did not order the filing of a response to Gould's emergency motion, nor did that court make any of the other Bankruptcy Rules applicable. In light of these uncontroverted facts, the petitioners cannot assert in good faith that the failure of the liquidating trustee to file a responsive pleading containing the affirmative defense of equitable estoppel prevented the district court from basing its decision on that theory. The petitioners entirely avoid reference to the Bankruptcy Rules in their analysis of this question, relying instead on Rule 52(a) of the Federal Rules of Civil Procedure, and cases that have no applicability to these facts.

The bank analyzed the elements of equitable estoppel in detail in its answer brief to Gould and Holywell's appeal of

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[4]Rule 52(a) of the Federal Rules of Civil Procedure, relied upon by the petitioners to support their claim that the district court lack authority to base its decision on the doctrine of equitable estoppel, is applicable to *adversary* proceedings, not motions. *See* 11 U.S.C. Section 7052.

the bankruptcy court's order (A 19-39). The petitioners ignore this fact as well. The district court properly relied on the factors raised in the bank's answer brief to support its application of equitable estoppel. The decisions of the bankruptcy court, district court and Eleventh Circuit should be left undisturbed.

1.

A district court reviewing a bankruptcy court decision of a contested matter has discretion to consider an issue raised for the first time on appeal

A number of courts have held that a reviewing court has discretion to consider for the first time an issue not expressly raised before the bankruptcy court.

In the Ninth Circuit, a bankruptcy appellate panel has held it is not precluded from considering an issue not raised before the bankruptcy court where such consideration is determinative of the outcome of the appeal. *In re Windmill Farms, Inc.*, 70 B.R. 618 (9th Cir. B.A.P. 1987). Another court has held that where refusal to consider an issue raised for the first time on appeal will result in a miscarriage of justice, its consideration is appropriate. *Matter of Louisiana Industrial Coatings, Inc.*, 53 B.R. 464 (D.C. La. 1985). In addition, an appellate court may also consider an issue not raised before the bankruptcy court where the issue appears in the record, or sufficient facts have been pled so that the debtor is appraised of the issue. *See In re Baldwin*, 70 B.R. 612 (9th Cir. B.A.P. 1987); *Johnson v. Fairco Corp.*, 61 B.R. 317 (N.D. Ill. 1986); and *In re Zerodec Megacorp, Inc.*, 60 B.R. 884, on remand, 59 B.R. 272 (E.D. Pa. 1985).

The record below, replete with references to the petitioners' conduct, more than adequately put the petitioners on notice of the issue on which the district court based its

decision. More importantly, that record is clear that the district court properly exercised its discretion in this case, as a substantial miscarriage of justice would otherwise have resulted. *See In re Blumer*, 66 B.R. 109 (9th Cir. B.A.P. 1986); *In re Kenitra, Inc.*, 64 B.R. 841 (9th Cir. 1986). This is particularly true where the Bankruptcy Rules not only do not require a written response to a motion, they also do not require written affirmative defenses, such as equitable estoppel.

B.

The petitioners are equitably estopped from claiming the funds allegedly due Twin are not assets of the trust

All of the elements of equitable estoppel are present in this case. The petitioners do not dispute what constitutes the essential elements of an equitable estoppel:

> 1. words, acts, conduct or acquiescence by the party to be estopped that have the effect of misrepresenting material facts;
>
> 2. such words, acts, conduct or acquiescence by the party to be estopped are willfull or negligent; and
>
> 3. the other party relies in good faith on such words, acts, conduct or acquiescence, and is harmed as a result of that reliance.

In re Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982), citing *Minerals & Chemicals Philip Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969); *Richards v. Dodge*, 150 So.2d 477 (Fla. App. 1963); and *State ex rel. Watson v. Gray*, 48 So.2d 84 (Fla. 1950); *see also Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461 (11th Cir. 1986); *Highland Ins. Co. v. Trinidad &*

Tobago, 739 F.2d 536 (11th Cir. 1984); and *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098 (11th Cir. 1981). Each one of these elements is present in this case.

1.

The debtors' statements, conduct and acquiescence, as well as Twin's conduct and acquiescence regarding the proceeds from the sale of the Washington properties caused the bankruptcy court and the creditors to believe the funds were "owned" by Holywell as dividends and were available to pay creditors

Prior to filing the emergency motion, the debtors and Twin led all of the creditors and the bankruptcy court to believe the funds would be available to pay creditors of the debtors.

First, Gould and Holywell represented in their 1984 motion to approve the sale of the Washington properties that the transaction would result in an "immediate cash infusion. . . . which inures to Holywell and Gould [which] will provide the *Debtors* with capital much needed as an essential part of the reorganization sought in these proceedings" (emphasis added) (A 4). The petitioners now argue that this statement excluded funds due Twin, yet this contention contradicts other statements of Gould and Holywell. In that same motion, the petitioners sought an order "authorizing and approving the sale by Holywell and Gould of certain real and personal property *owned by Holywell and Gould* as partners and stockholders in Twin. . . ." (emphasis added) (A 2).

In addition, the district court found that prior to confirmation of the bank's plan, Holywell submitted a disclosure statement and a proposed plan of reorganization

which made it "manifestly" clear to the bankruptcy court and all creditors that these funds would be available to pay creditors (10a). The district court also found that Holywell and Gould filed certificates with the bankruptcy court regarding their proposed plans which revealed that funds in excess of $14 million, including Twin's proceeds from the sale of the Washington properties, would be available to "quench" creditors' claims (10a). The district court also relied upon statements made by Gould, who testified that Twin's share of the Washington sale proceeds "had to go to Holywell as dividends" (10a). It is important to note that his testimony was given during a Rule 2004 examination immediately after the Washington sale.

The district court went on to cite additional findings with respect to the petitioners' misrepresentations:

> In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell [nor Twin] appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted 'cash collateral as defined in Section 363 of the Bankruptcy Code'. Neither Gould nor Holywell [nor Twin] took appeal from this order.
>
> Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds

> from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidating Trust and serve as a font for permissible claims against the debtors' estates. . . .
>
> In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied (10-11a).

2.

Gould, Holywell and Twin acted willfully or negligently in misleading the bankruptcy court and creditors with respect to the sale proceeds

The district court correctly found that the second element of equitable estoppel was also met:

> There can be no doubt that Holywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to

> creditors, and Gould's testimony, that the actions of Gould and Holywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel (12a).

The facts go beyond those relied upon by the district court to support equitable estoppel in this case. In their initial brief on the appeal to the district court from the August 8, 1985 order of confirmation, the debtors stated:

> Holywell and Gould also had equity participations in limited partnerships that owned three office buildings in the District of Columbia and Virginia [the Washington properties at issue]. The partnerships sold those office buildings for an aggregate price in excess of $100,000,000. The sales were closed on December 31, 1984 and January 5, 1985. *Holywell and Gould* realized approximately $32 million from these sales (case no. 85-3225-CIV-Aronovitz) (emphasis added).

Clearly, when the petitioners were attacking confirmation they did not acknowledge, as they do now, that Twin had any genuine participation in the $32 million.

The petitioners claimed in their brief to the district court in their appeal from the Order on Emergency Motion for Clarification that they "raised vociferous objections as soon as it became clear in January 1986 how the Liquidating Trustee planned to use the Twin funds" (Appellants' Brief,

p. 30). That statement belies the facts. The bank's plan, served on the petitioners in the first part of 1985, states the balance of the Washington Proceeds will be available for distribution to the creditors (A 17). In addition, the November 22, 1985 report of the Liquidating Trustee, which was approved by order of the bankruptcy court, lists these funds as an asset of the trust. Neither the petitioners nor Twin appealed that order. Lastly, the debtor-petitioners never properly took issue with the plan provision regarding the Washington proceeds. In the bankruptcy court's findings and conclusions contained in the order of confirmation on remand, the court found that the proceeds from the sale of the Washington properties, some $32 million, were the bank's cash collateral to be used to fund the trust and pay the debtors' creditors (A 6-9). The district court affirmed those findings, *Miami Center Limited Partnership v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and specifically noted the plan used "the proceeds from the sale by the debtors of certain realty owned by them in Washington, D.C." 59 B.R. at 345. The Eleventh Circuit held the debtor/petitioners' appeal was moot, as the plan had been substantially consummated and the court could not fashion effective relief. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). Twin *never* objected to the plan, *never* appealed from the order of confirmation, and *never* sought to intervene. That inaction is fatal to this proceeding.

3.

The liquidating trustee and creditors relied upon the petitioners' representations and conduct to their detriment

The bankruptcy court, the creditors, and later the liquidating trustee all relied to their detriment upon the petitioners' conduct and representations as to the use of the sale proceeds. The district court found that because of the

debtors' representations and conduct, the bank included the sale proceeds in its plan for distribution to creditors (12-13a). The district court concluded that the petitioners' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors with its cash infusion into the debtors' estates was relied upon by the bank in deciding not to object to the transaction (a12). The same could be said for all creditors who voted in favor of the bank's plan. In addition, the district court found that the bank relied on Holywell's disclosure statement, the petitioners' failure to complain about the part of the bank's plan in question and Gould's testimony, "all of which suggested expressly or implicitly that Twin's share of the proceeds from the sale of the Washington properties was available for payment to creditors" (a12-13). Again, the same statement regarding reliance could be said to apply to all creditors. Even more importantly, neither the petitioners nor Twin ever appealed the cash collateral order, which deemed the entirety of the sale proceeds to be the bank's cash collateral. In reliance on the petitioners' conduct, the bank funded the plan, in part, with the sale proceeds (its cash collateral), and the creditors voted for that plan. The plan was implemented in 1985, and the liquidating trustee has used the Twin proceeds to pay creditors since that date.

The liquidating trustee, the bankruptcy court and all of the creditors have relied to their detriment on the petitioners' representations. The petitioners are estopped from changing the story at this stage of the proceedings.

II.

THE ARGUMENT THAT TWIN WAS SUBSTANTIVELY CONSOLIDATED WITH THE DEBTORS AND THAT ITS ASSETS SEIZED WITHOUT DUE PROCESS IS FRIVOLOUS AND IRRELEVANT

The petitioners argue that the inclusion of the Washington proceeds in the plan is the equivalent of substantively consolidating Twin with the five debtors and that the inclusion of the Washington proceeds constitutes a seizure of property without due process. These arguments have no merit whatever in light of the fact that early in the bankruptcy proceedings Gould testified the funds in question are dividends due Holywell's estate, and all of Holywell's Section 541(a) defined assets became assets of the Miami Center Liquidating Trust upon confirmation of the plan.

The plan, as confirmed, did not substantively consolidate Twin with the debtors. There is no order of such substantive consolidation. The plan simply provided that the funds in question would become an asset of the trust available to pay creditors of the debtors.

No other assets of Twin, if there are any,[5] were consolidated with the debtors' assets, "substantively" or otherwise. Substantive consolidation simply never happened, either as provided in 11 U.S.C. Section 105, or in any other way. The district court found that there was no substantive consolidation, for "Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington

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[5]In its Schedule to its Statement of All Liabilities of Debtor, Holywell lists itself as the 100% stockholder of Twin. That schedule does not list any of Twin's liabilities. Rather, it lists Twin's value at $13,210,000—the amount of the Washington proceeds payable to Twin (A 28).

properties, remained wholly intact under the plan of reorganization" (a13).

There has been no taking of a third party's property without due process, as the property in question (the Washington proceeds), as petitioner Gould testified, "had to go to Holywell as dividends" (a10). Thus, these funds, although technically earmarked as belonging to Twin, in fact belonged to Holywell by Gould's own admission. It is important to note that Gould, the sole shareholder of Holywell, was also the president, director, and sole agent of Twin. Because the funds belonged to a debtor's bankruptcy estate, it was entirely proper that they were utilized to pay creditors. The petitioners' argument to the contrary is meritless in light of these facts.

III.

THE PETITION FOR WRIT OF CERTIORARI IS MOOT

The petition for writ of certiorari is moot in light of the Eleventh Circuit's recent decision in *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), in which the Eleventh Circuit dismissed the debtors' appeal of the order of confirmation as moot because no stay was in effect, the plan had been substantially consummated, and thus the court could not fashion meaningful relief. That opinion is the subject of other proceedings in this Court by the petitioners by way of petitions for writs of certiorari and mandamus, case numbers 87-1988 and 87-1989, in which proceedings the liquidating trustee has filed briefs in opposition. The plan, as confirmed, is the law of the case.

This petition for writ of certiorari is moot because the asset in question was specifically made part of a plan of

reorganization, which was confirmed and substantially consummated. The money that the petitioners claim is due Twin was commingled with other trust monies and was used to pay over 400 innocent creditors. The law is well settled that an appeal will be dismissed as moot when events occur which prevent the court from fashioning meaningful relief, for Article III of the Constitution envisions a live controversy; it does not encompass the rendering of advisory opinions. *Central States v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987); *In re Golden Plan of California, Inc.*, 829 F.2d 705 (9th Cir. 1986); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *Matter of Andy Frain Services, Inc.*, 798 F.2d 1113 (7th Cir. 1983); *Matter of King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980); *In re Revere Copper, & Brass, Inc.*, 78 B.R. 17 (Bkrtcy. S.D. N.Y. 1987); *In re Blumer*, 66 B.R. 109 (9th Cir. B.A.P. 1986).

It is equally well settled that in a bankruptcy proceeding, with no stay in effect, a court cannot undo a sale to a third party purchaser who is not before the court. *See In re Sun Valley Ranches, Inc.*, 823 F.2d at 1375; *Central States v. Central Transport, Inc.*, 841 F.2d at 96; *Matter of King Resources Co.*, 651 F.2d at 1331-32; *In re AOV Industries, Inc.*, 792 F.2d at 1147-48; and *Matter of Combined Metals Reduction Co.*, 557 F.2d at 188.

In this case, the Washington Properties were sold to a third party not before the Court. The sale proceeds have been used to fund the trust and pay creditors.

In determining that the court could not award the debtors effective relief, the Eleventh Circuit analyzed the effect of undoing this plan:

> [The bank] surrendered $30 million of cash collateral it was holding [the proceeds from the sale of the Washington properties]. These funds have been the primary source for payments to creditors and reserves totaling approximately $30 million. . . . The trustee pressed his view that . . . . rejection [of the plan] would require him to seek to reclaim what he had paid out, much of which was unrecoverable. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d at 1556.

The Eleventh Circuit further stated that should the plan be unwound, as the debtors suggest, the bank might wish to realize on the cash collateral it held, but the court noted that "the debtors have not given a meaningful suggestion of how. . . . to get back the cash collateral; they say only that the creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them." *Ibid.*

A.

The effect of the petition for writ of certiorari would be a modification of the substantially consummated plan, which is prohibited.

The debtor/petitioners seek a piecemeal dismantling of a confirmed plan of reorganization, in derogation of well settled law. *In re AOV Industries, Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986), cited with approval by the Eleventh Circuit in *Miami Center Limited Partnership v. The Bank of New York, supra.* The attempt to return Twin's share of the proceeds from the sale of the Washington properties is nothing more than an attempt to modify a substantially consummated plan. This the petitioners cannot do. *See* 11

U.S.C. Section 1127(b);[6] *In re Sun Country Dev., Inc.*, 764 F.2d 406, 407 (5th Cir. 1985); *In re Information Dialogues, Inc.*, 662 F.2d 475, 476 (8th Cir. 1981); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th cir. 1981); *In re Seminole Park and Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1974); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re AT of Maine, Inc.*, 56 B.R. 55, 57 (Bkrtcy. D. Me. 1985); *In re Northampton Corp.*, 59 B.R. 963, 968-69 (E.D. Pa. 1984); and *In re Heatron*, 34 B.R. 526 (Bkrtcy. W.D. Mo. 1983).

The confirmed and unstayed plan, which specifically includes the funds at issue, is binding on all parties to the proceeding regardless of whether they accepted the plan. It is no longer subject to modification. *See In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bkrtcy. E.D. Mich., N.D. 1984).

IV.

THE PETITIONERS LACK STANDING TO RAISE THE CLAIMS ASSERTED IN THE PETITION FOR WRIT OF CERTIORARI

All of the arguments contained in Petition for Writ of Certiorari center on the premise that the disputed funds belong to Twin. Assuming for the sake of argument that this is true, then the petitioners lack standing to raise these claims on behalf of Twin, as the petitioners cannot assert the rights of a third party. *See Lord v. Local Union No. 2088*, 481 F.Supp. 419, affirmed in part, revised in part, 646 F.2d 1057, rehearing denied, 654 F.2d 723, *cert. denied*, 458 U.S. 1160; *Rite-Research Improves Environment, Inc. v. Costle*, 78 F.R.D. 321, revised, 650 F.2d 1312.

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[6]Section 1127(b) of the Bankruptcy Code provides: "The proponent of a plan or a reorganized debtor may modify such plan any time after confirmation of such plan and *before* substantial consummation of such plan. . . ." (emphasis added).

"At an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752, 758, ____U.S.____, 70 L.Ed. 2d 700 (1982) (citations omitted). This the petitioners have failed to do. Their only claim is that Twin's assets, not theirs, have been taken.

As the Court has observed in *Baker v. Carr*, "the gist of the question of standing" is whether the petitioners have alleged "such a personal stake in the outcome of the controversary as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. 186, 204 (1962). Assuming that the petitioners' claim that the funds belonged to Twin is true, then the petitioners clearly have no personal stake in the outcome of the controversy. Moreover, in light of the tenor of the petitioners' arguments, it should be noted that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian College*, 102 S.Ct. at 765. The petitioners cannot confer standing on themselves by asserting the rights of others. *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983); *Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bkrtcy. S.D. N.T. 1986).

The plan, as confirmed, provides that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code, are assets of the trust. Section 541(a) includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. Section 541(a)(1). The scope of the definition of "property" in Section 541(a)(1) is

extraordinarily broad and includes all types of property and rights to property which the debtor possesses. *In re Golden Plan of California, Inc.*, 37 B.R. 167 (Bkrtcy. Ca. 1984); *In re Koch*, 14 B.R. 64 (Bkrtcy. Kan. 1981). This property right encompasses all the stock owned by a debtor, including the stock of wholly owned subsidiary companies of a corporate debtor. *In re Deak and Co., Inc.*, 63 B .R. 422 (Bkrtcy. S.D. N.Y. 1986) (shares of stock owned or controlled by the debtor were property of the estate thereby providing the bankruptcy court with *in rem* jurisdiction in an adversary proceeding to declare stock pledge a voidable preference); *In re Peoples Bankshares, Ltd.*, 68 B.R. 536 (Bkrtcy. N.D. Iowas 1986); *In re Wallace*, 66 B.R. 834 (Bkrtcy. E.D. Mo. 1986). Thus, all of the stock owned by the petitioners, including the stock of Twin, became property of the Miami Center Liquidating Trust pursuant to the express terms of the confirmed plan. The petitioners lack standing to assert otherwise.[7]

Even if Holywell were still entitled to claim and use the stock of Twin, Holywell would not have standing to raise the issues contained in the petition for writ of certiorari; only Twin would have this power,and it *never* has exercised it.

A shareholder may institute a derivative lawsuit to enforce rights of a corporation under certain conditions, but this never happened here. No shareholder's derivative action

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[7]Twin has brought suit against the liquidating trustee in his individual capacity in the United States District Court for the Western District of Virginia, for a preliminary and permanent injunction to prevent the trustee from taking any action with respect to the stock, to quiet title, to recover its stock certificates on behalf of Holywell, to establish that Holywell is the sole shareholder and to recover money damages (A 81-86). Interestingly enough, Holywell, the real party in interest, is not a party in that proceeding.

on behalf of Twin was begun by Holywell (assuming Holywell still controls Twin's stock, a fact which the liquidating trustee strongly disputes) or by the Miami Center Liquidating Trust. The present appeal arose out of an emergency *motion* filed by Gould and Holywell for clarification of the ownership of the proceeds from the sale of the Washington properties. All other issues are collateral.

CONCLUSION

The instant petition is yet another of the debtors' collateral attacks on the confirmed plan. That Twin never appealed any of the relevant orders and that the petitioners seek to assert a claim on behalf of Twin lends further credence to the bankruptcy court's finding that the difficulty in tracing the obligations and claims against the affiliated creditors was "completely attributable to the labyrinth that Gould has created." *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d at 852. It is now too late to modify the confirmed plan, for the funds at issue have been co-mingled with other trust assets and used to pay creditors. The plan has been substantially consummated and the Court cannot award meaningful relief. The issue is moot. Moreover, the petitioners lack standing to raise the claims presented in their petition.

Lastly, the district court was correct in applying the doctrine of equitable estoppel to prevent Gould and Holywell from reneging on their earlier representations as to the availability of the funds in question to pay creditors. The petitioners and Twin misled the bankruptcy court and the creditors into believing these monies were to be used to pay creditors of the debtors.

The petition for writ of certiorari should be denied on the merits. Alternatively, these proceedings should be dismissed on the ground of mootness and on the additional ground that the petitioners lack standing to assert claims belonging to a third party.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire

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VERIFICATION

Theodore B. Gould, being first duly sworn, deposes and says:

I am the President of Twin Development Corporation, the Plaintiff herein; I have read the contents of this Complaint, including the request for Preliminary Injunction, Permanent Injunction, and Declaratory Relief, and belief the same to be true according to the best of my knowledge, information, and belief.

/s/ THEODORE B. GOULD

Theodore B. Gould, President
Twin Development Corporation

Sworn to and Subscribed before me this 4th day of August, 1987.

/s/ FAYE M. McBURNEY

Notary Public

My Commission Expires: My Commission Expires June 29, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case Nos. 84-01590-BKC-TCB
through 84-01594-BKC-TCB

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

MOTION FOR ORDER APPROVING AND AUTHORIZING HOLYWELL CORPORATION AND THEODORE B. GOULD TO CONSUMMATE THE SALE OF CERTAIN REAL AND PERSONAL PROPERTY

Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), debtors and debtors-in-possession, move this court for an order authorizing and approving the sale by Holywell and Gould of certain real and personal property owned by Holywell and Gould as partners and stockholders in Twin Development Corporation, a Virginia corporation ("Twin"), 1300 North 17th Street Associates, a Virginia limited partnership ("1300"), 1616 Reminc Limited Partnership, a Virginia limited partnership ("1616"), Eleven DuPont Circle Associates, a District of Columbia limited partnership ("Eleven") and DuPont Land Associates, a District of Columbia limited partnership ("DuPont Land") (collectively the "Sellers"), pursuant to §363(b) of the Bankruptcy Code and as grounds therefor state:

1. On August 22, 1984 (the "Filing Date"), Holywell, Gould and the other debtors herein (collectively the

"Debtors") each filed a petition for reorganization under Chapter 11, §301 of the Bankruptcy Code (the "Code") and each has continued in the management and operation of its respective business and properties as a debtor-in-possession pursuant to §1107 and §1108 of the Code. The within Chapter 11 cases are being jointly administered pursuant to order of this Court. No trustee or examiner has been appointed.

2. The Debtors are principally engaged in the business of owning and operating office buildings, hotels and other commercial real property.

3. Gould, one of the Debtors herein, is the President of Twin and is the managing general partner of 1300, 1616, Eleven and DuPont Land. Holywell, one of the Debtors herein, owns all of the issued and outstanding shares of common stock of Twin. Gould owns all of the issued and outstanding shares of common stock of Holywell.

4. Sellers have entered into a Purchase Agreement (the "Purchase Agreement"), dated July 26, 1984, with Hadid Investment Group, Inc., a Virginia corporation, and/or assigns ("Hadid"), which was amended by First Amendment to Purchase Agreement between Sellers and Hadid dated August 28, 1984 (the "First Amendment"), whereby Hadid shall acquire all of Seller's right, title and interest in and to two office buildings located in Arlington, Virginia, and commonly referred to as the 1616 Property and the Twin Property, and one office building located in Washington, D.C. and commonly referred to as the Washington Property, for a purchase price of One Hundred Twelve Million Dollars ($112,000,000). A copy of the Purchase Agreement and the First Amendment are annexed hereto and incorporated herein as Exhibit "A" and reference should be made thereto for the specific terms and provisions thereof. Since the inception of these Chapter 11 proceedings, Holywell and Gould have been unable to proceed with the closing of the

Purchase Agreement inasmuch as their status as Debtors-in-Possession has effectively precluded the Seller's ability to close and consummate the sale transaction as contemplated by the Purchase Agreement. Additionally, the entry of an Order of this Court authorizing Holywell and Gould, Debtors herein, to sell their right, title and interest in the real and personal property is a condition precedent to the closing of the transaction.

5. The purchase price for the subject properties, as set forth in the Purchase Agreement, is fair and equitable, and represents not less than the fair market value of such property, having been negotiated at arm's length. The Purchaser has no affiliation with any Seller entity or with any Debtor in these proceedings.

6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale which inures to Holywell and Gould will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

7. Under §363(b) of the Code, a Debtor-in-Possession, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. Bankruptcy Rule 2002(a) (2) provides that in the event of a sale pursuant to §363(b), the Debtor-in-Possession shall give all creditors not less than Twenty (20) days notice of the hearing on such sale. The Debtors intend to comply with the notice requirements set forth in Bankruptcy Rule 2002.

WHEREFORE, movants pray for the entry of an order:

(a) Approving and authorizing Holywell and Gould to consummate the sale of the 1616 Property, the Twin Property and the Washington Property to Hadid upon the terms and conditions set forth in the Purchase Agreement and the First Amendment; and

(b) Granting such other and further relief as this Court deems just and proper.

Dated: Miami, Florida
September 28, 1984

KENT, WATTS, DURDEN, KENT,
NICHOLS & MICKLER

By /s/ Fred H. Kent, Jr.
Fred H. Kent, Jr.
Robert C. Nichols

850 Edward Ball Building
Jacksonville, FL 32202
904/354-1600

Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos.: 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY", a secured creditor, moves this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of

BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is

ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be performed
by Fred H. Kent, Jr.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

In re:

HOLYWELL CORPORATION, a Delaware corp.,

Debtor.

DISCLOSURE STATEMENT

Exhibit "E" [to Holywell's Disclosure Stmt]

HOLYWELL CORPORATION
(DEBTOR IN POSSESSION)
LIQUIDATION ANALYSIS
FEBRUARY 15, 1985

	ASSETS (2/15/85)	LIQUIDATION VALUE
1. Cash	$15,110,000	$15,110,000
2. Advances due from MCLP	4,080,000	0
3. Loans due from Officer	2,015,000	0
4. Note due from MCLP	490,000	490,000
5. Mortgage note due (Charleston)	50,000	50,000
6. Accounts receivable	183,000	170,000
7. Furniture and equipment, net	64,400	20,000
8. Investments—Twin Development Corp.	13,128,533	13,128,533
9. Investments—Washington subsid. corps.	550,000	550,000
10. Investments—Miami subsid. corps.	9,168,000	0
11. Investments—Affiliated ptns.—1300	925,000	0
12. Investments—Affiliated ptns.—MCLP	5,250,000	0
TOTAL LIQUIDATION VALUE	$51,013,933	$29,518,533
PRIORITIES (2/15/85)		
1. Secured debt	$ 2,015,000	$ 2,015,000
2. Estimated costs and expenses of liquidation	150,000	150,000
3. Post-petition priority creditors	20,000	20,000
4. IRS—corp. taxes		15,000,000
TOTAL PRIORITIES	$ 2,185,000	$17,185,000
TOTAL AVAILABLE FOR DISTRIBUTION TO UNSECURED CREDITORS	$48,828,933	$12,333,533

[This Liquidation Analysis is qualified by and should be read in conjunction with the notes that follow it.]

Exhibit "C" [to Holywell's plan]

HOLYWELL CORPORATION
PRO FORMA BALANCE SHEET
FEBRUARY 15, 1985

ASSETS

INVESTMENTS	
Twin Development Corp.—Cash	$13,128,533
Other subsidiary corps.—Washington	550,000
Other subsidiary corps.—Miami	9,168,000
Affiliated partnerships—1300	925,000
—MCLP	5,250,000
	$29,021,533
OTHER ASSETS	
Cash*	$15,110,000
Advances and interest receivable—MCLP	4,080,000
Loans and interest receivable—Officer	2,015,000
Note receivable—MCLP	490,000
Mortgage note receivable	50,000
Accounts and interest receivable	183,000
Furniture and equipment, net	64,400
	$21,992,400
TOTAL ASSETS	$51,013,933

LIABILITIES

Accounts payable	$ 900,000
Notes payable—1300	380,000
Notes and interest payable—BNY	2,015,000
	$ 3,295,000
NET EQUITY	$47,718,933

HOLYWELL CORPORATION
(DEBTOR IN POSSESSION)
NOTES TO LIQUIDATION ANALYSIS
FEBRUARY 15, 1985

A. ASSET LIQUIDATION VALUE

Values shown are based on the company's estimation that on forced liquidation, the Company's assets would produce the following percentage of recovery:

Cash	100%
Advances, loans and other due from MCLP	9%
Accounts and mortgages receivable	94%
Investments—Washington subsidiary corps.	100%
Personal property	31%

B. BOOK VALUE OF INVESTMENTS—WASHINGTON SUBSIDIARY CORPS.

The book value for wholly owned Washington, D.C. based subsidiary corporations is based on the net realizable value of receivables due to the corporations by independent third parties.

C. AMOUNT OF SECURED DEBT

The amount of secured debt shown involves interest, all of which is due to the Bank of New York.

D. SECURED DEBT GUARANTEES AND CONTINGENCIES

The Miami Center Limited Partnership and Chopin Associates construction and land loan of $195,086,028 and accrued interest of approximately $30,492,880 are secured by (1) first deeds of trust on the land and leasehold; (2) substantially all the assets of Holywell Corporation; and (3) the personal guarantee of Theodore B. Gould.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

AMENDED CONSOLIDATED DISCLOSURE STATEMENT OF HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, MIAMI CENTER CORPORATION AND THEODORE B. GOULD PROPOSED BY THE BANK OF NEW YORK

AMENDED CONSOLIDATED DISCLOSURE STATEMENT

This Amended Disclosure Statement is submitted on behalf of The Bank of New York ("BNY") in support of its Consolidated Plan of Reorganization ("BNY's Plan"). BNY's Plan, dated February 26, 1985, as amended, is on file with the Bankruptcy Court and a copy is annexed hereto as Exhibit 1.

BNY is the major secured creditor of each of the Debtors. The Debtors are indebted to BNY, under direct and guarantee obligations, in the amount of approximately $234,342,743 as

of March 1, 1985, which amount does not include expenses of approximately $1,611,563 to March 14, 1985. Interest and expenses are currently accruing at a rate of approximately $2,300,000 per month. BNY holds, as security for the indebtedness, *inter alia*, first mortgages on Miami Center, which has an appraised value of $255,600,000 and a first security interest in approximately $32,422,798 in cash. Under BNY's Plan, which contemplates a substantive consolidation of the estates and a liquidation of the assets, BNY will purchase Miami Center for $255,600,000, within 45 days from the Effective Date. Upon such purchase, BNY will release all other collateral that it holds as security for the BNY Debt, including its security interest in the $32,422,798 in cash, subject, however, to the security interest in such cash and other collateral that BNY will retain as collateral for the BNY-Holywell Loan in the principal amount of $1,750,000.

Based on a prompt sale of Miami Center and the release of those funds, it is anticipated that all administrative claims, all priority claims and all claims of unsecured creditors, other than Affiliated Creditors, will be paid substantially in full or in full. Based on the Debtors' analysis of the outstanding claims, an equity may remain for the Debtors.

THE FINANCIAL INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT RELATING TO THE INDEBTEDNESS OF THE DEBTORS TO BNY AND THE SECURITY THEREFOR WAS PREPARED BY BNY FROM ITS RECORDS AND THE INFORMATION TO THE BEST KNOWLEDGE OF BNY IS ACCURATE AND COMPLETE. CERTAIN FINANCIAL AND OTHER INFORMATION WAS OBTAINED FROM THE DEBTORS' PLANS. ACCORDING TO THE DEBTORS' PLANS, SUCH INFORMATION WAS PREPARED BY AGENTS AND EMPLOYEES OF THE DEBTOR AND HAS NOT BEEN AUDITED; HOWEVER, ACCORDING TO THE DEBTORS' PLANS THE INFORMATION IS ACCURATE AND

COMPLETE TO THE BEST KNOWLEDGE OF SUCH AGENTS AND EMPLOYEES. CERTAIN OTHER INFORMATION WAS PROVIDED BY GOULD AND CERTAIN OTHER DEBTORS TO BNY FROM TIME TO TIME PRIOR TO THE FILING OF THESE CASES. BNY HAS NO INDEPENDENT KNOWLEDGE OF THE TRUTH, COMPLETENESS OR ACCURACY OF SUCH INFORMATION.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

CHAPTER 11 Proceedings

IN RE:

HOLYWELL CORPORATION, et. al.

Debtors

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0848-Civ-Ryskamp

(Bankruptcy Cases No.
84-01590-BKC-TCB and
84-01594-BKC-TCB)

HOLYWELL CORPORATION, and
THEODORE B. GOULD,

Debtor/Appellants,

v.

THE BANK OF NEW YORK, and
FRED STANTON SMITH,
as Liquidating Trustee,

Appellees.

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida

ANSWER BRIEF OF APPELLEE, THE BANK OF NEW YORK

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TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

JURISDICTION

This Court has jurisdiction over appeals from orders of the Bankruptcy Court under 28 U.S.C. §158 and Bankruptcy Rule 8001 *et seq.* However, as set forth in Section II of this brief, the Court should decline to exercise jurisdiction over the subject matter of this particular appeal on grounds of mootness. The funds in controversy below have been paid or otherwise irrevocably applied in accordance with the terms of a plan of reorganization proposed by appellee, The Bank of New York (the "Bank"), duly confirmed on August 8, 1985 by the Bankruptcy Court. The Confirmation Order was subsequently affirmed by the United States District Court on March 20, 1986.[1] The appellants did not post a supersedeas bond (as required by the District Court) in order to stay the consummation of the plan, and it has now been substantially consummated. Mr. Gould himself, who is one of the appellants here and was also sole shareholder of the other appellant, stated in open court on June 9, 1986, that, "this plan has obviously been substantially consummated."[2]

Thus, the relief sought by the appellants would dismember a plan of reorganization that has been confirmed, affirmed, and substantially consummated, and that has not been stayed. That relief is neither fair nor possible, and accordingly this appeal should be dismissed as moot. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); 11 U.S.C. §1101(2).

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[1] *Holywell Corp., et al, v. The Bank of New York*, Case No. 85-3225-Civ-Aronovitz.

[2] Court Paper Number 1314, page 73; excerpt attached as Bank's App. 1. "Bank's App. ____" is a reference, by tab number, to the record excerpts attached to this brief.

STATEMENT OF THE ISSUES

I. **Was the Bankruptcy Court's Order of January 28, 1986 "Clearly Erroneous"?**

II. **Is This Appeal Moot?**

STANDARD OF REVIEW

The Bankruptcy Court's finding of fact are to be affirmed unless "clearly erroneous". Bankruptcy Rule 8013. To the extent that the Bankruptcy Court's findings were affirmed by District Judge Aronovitz's Order affirming confirmation of the Plan [Dbt. App. 387],[3] the clearly erroneous standard must be given "strict application". *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

STATEMENT OF THE CASE

The appellants are two of five related debtors in the Chapter 11 bankruptcy proceedings below. Debtor Theodore B. Gould ("Gould") owned 100% of the stock of Debtor Holywell Corporation ("Holywell"), and also served as President and a director of Holywell. In turn, Holywell owned 100% of the stock of Debtor Miami Center Corporation ("MCC"); Gould served as President and a director of MCC as well. Gould and MCC were the sole general partners of Debtor Chopin Associates ("Chopin") and of Debtor Miami Center Limited Partnership ("MCLP"). All five Debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami. The complex interrelationships among the Debtors and other affiliated entities are depicted on Bank's App. 2.

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[3] "Dbt. App. 387" is a reference to page 387 of the appendix to the debtor/appellants' brief.

Debtor Holywell owned many subsidiaries other than Debtor MCC. One such non-debtor subsidiary, wholly-owned by Holywell, was Twin Development Corporation ("Twin"). Gould served as President and as a director of Twin as well.

The Bank was the construction lender for the Miami Center Project, and held a secured claim in the bankruptcies for over $200 million. In an adversary proceeding to establish its lien, the Bank obtained a judgment for over $234 million as of March 14, 1985, with interest accruing at over $2 million per month thereafter [Bank's App. 3]. The Bank disputes the Debtors' chronology in their "Statement of the Facts" as to both accuracy and relevance. Since the focus of this appeal should be upon the rights of various parties to the $13,163,490 realized by Twin from the sale of its Washington, D.C. office building, it is important to review carefully the record on that subject.

1. On June 23, 1983, Holywell pledged the stock of Twin (and other subsidiaries) to the Bank to secure Holywell's guaranty of the construction loans [Dbt. App. 258].

2. On February 1, 1984, Holywell and the other Debtors defaulted on the loan obligations, and the loans remained in default through the filing of the bankruptcy petitions on August 22, 1984 [C.P. No. 385h, pages 176-77].[4] By virtue of the default and the terms of the stock pledge, the Bank had the right to exercise all rights of ownership over the Twin stock [Dbt. App. 272-77].

3. The money realized by Twin was part of the "Washington Proceeds"—approximately $30 million in net

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[4] "C.P. No. ____" refers to the Bankruptcy Court Paper Number of a document in the Bankruptcy Court record below. "Adv. Pro. No. ____" indicates that a particular document was separately docketed in a designated adversary proceeding within the five bankruptcy cases.

proceeds received by the five debtors (the "Gould Group") from the sale of three properties in Washington D.C. in December, 1984 and January, 1985. Until they filed the motion at issue here, Gould and Holywell always recognized and agreed that the Washington Proceeds would be used to pay allowed claims against the debtors:

(a) Gould and Holywell admitted their ability to control Twin and its assets by seeking Bankruptcy Court approval in October, 1984 for the sale of Twin's real estate [Dbt. App. 1]. In that motion, Gould and Holywell acknowledged that Bankrutcy Court approval of the sale of Twin's real estate was a condition precedent to the closing [Dbt. App. 3, Paragraph 4; Dbt. App. 64]. More significantly, Gould and Holywell represented to the Bankruptcy Court and to the hundreds of creditors (including the Bank) that:

> 6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale *which inures to Holywell and Gould* will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings. [Dbt. App. 3; emphasis supplied].

Thus, Holywell and Gould represented and admitted that Twin's share of the net proceeds of sale (ultimately $13.1 million) was to be controlled and/or utilized by Holywell and Gould. If, as the appellants now argue, Twin was an independent entity, there would have been no reason or necessity for Gould and Holywell to have sought Bankruptcy Court approval for the sale of Twin's property.

(b) Based upon the representations by Gould and by Holywell that Twin's proceeds would be a "cash infusion" for the two Debtors, the Bank and other creditors did not

oppose the sale, and all parties agreed that the sales proceeds should be (a) segregated and (b) subject to the jurisdiction of the Bankruptcy Court [Dbt. App. 68 to 71]. The Bankruptcy Court directed that:

> 1. Holywell shall cause Twin Development Corp. ("Twin"), a wholly owned subsidiary of Holywell, to deposit into a segregated account, subject to further order of this Court, any net funds payable to Twin from the sale of certain improved real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended August 26, 1984, between Hadid Investment Group, Inc., as purchaser and Twin, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement").
>
> * * *
>
> 3. Holywell and Gould shall deposit all funds, including any beneficial interest, into a segregated account, subject to further order of this Court including any and all funds payable to or by Gould, Holywell or to any other entity or entities which are owned (wholly or partially) or controlled (wholly or partially) by Holywell and/or Gould as a result of the sale of the Washington Properties. The funds shall not include the proceeds payable to any independent person or entity in which neither Gould, Holywell, nor any related entity has any interest of any nature whatsoever. [Dbt. App. 68-70]

Neither Twin nor either of the appellants appealed that Order of December 16, 1984.

(c) Thereafter, the Bank moved for a determination that all such funds, *including* the Twin proceeds, were cash collateral subject to the Bank's lien [Bank's App. 4]. After a hearing, the Bankruptcy Court granted that motion [Dbt. App. 77 to 80]. Specifically, the Bankruptcy Court determined in an Order of December 31, 1984, that, "the net proceeds of the Washington sale constitute cash collateral as defined in §363 of the Bankruptcy Code" [Dbt. App. 79]. Once again, neither Twin nor either of the appellants took an appeal from the entry of that Order.

(d) Subsequently the Debtors filed Schedules and Statements of Affairs listing their respective assets and liabilities. Holywell admitted its 100% control over Twin, and the absence of any liabilities on the part of Twin, by scheduling Twin's value in the Holywell Schedules as $13,210,000.00—the amount of Washington Proceeds payable to Twin. [C.P. No. 275, Schedule B-2; Bank's App. 5].

(e) Thereafter, the Debtors promulgated separate (but similar) disclosure statements and plans of reorganization. The Holywell disclosure statement advised creditors that Twin's cash from the "Washington Proceeds" would be used to pay the claims of creditors [C.P. No. 466, page 4].

(f) Next, the Bank proposed a plan of reorganization and companion disclosure statement (the "Bank's Plan"). As amended, the Bank's Plan clearly disclosed that the "Washington Proceeds", including Twin's proceeds, would (1) become part of the Miami Center Liquidating Trust and (2) be used to pay Allowed Claims [Dbt. App. 96, 101-02, 115, 124-25]. The Bank's disclosure statement listed the exact amount of the Washington Proceeds, $32,422,798.37, so it was unmistakeable that Twin's proceeds were included [Dbt. App. 96, 101]. The Bank reiterated that, "the Bankruptcy Court has determined that the Washington Proceeds are BNY's [the Bank's] cash collateral" [Dbt. App. 102]. Although

the debtors and various related entities filed numerous objections to the Bank's Plan [C.P. No. 534, 545, 580, 849, 888a], *neither Twin nor either of the appellants ever objected* to the inclusion and use of Twin's proceeds as part of the Bank's Plan.

(g) Pursuant to the Bankruptcy Court's Orders, both the debtors and the Bank were required to file certificates relating to the voting by creditors and to the source of cash to fund their respective plans of reorganization. On May 13, 1985, counsel for the appellants certified that $14,738,000 was available to fund the debtors' proposed plans, including funds in the "Twin Development Trust Account" at Florida National Bank [C.P. No. 664; Bank's App. 6]. In so certifying, the debtors again evidenced their complete control over Twin's interests in the Washington Proceeds, and the clear understanding that such funds would be used—under both the debtors' and the Bank's proposed plan—to pay creditors.

(h) When the Bankruptcy Court confirmed the Bank's Plan [August 8, 1985, Dbt. App. 237], (1) Twin did not take an appeal and (2) the debtors never raised, as an issue on appeal, the disposition of Twin's $13.1 million pursuant to the terms of the Bank's Plan. To the contrary, in their initial brief in the appeal from the Confirmation Order,[5] the debtors stated as a fact that:

> Holywell and Gould also had equity participations in limited partnerships that owned three office buildings in the District of Columbia and Virginia. The partnerships sold those office buildings for an aggregate price in excess of $100,000,000. The sales were closed on December 31, 1984 and January 5, 1985. *Holywell and Gould* realized approximately $32 million from these sales. [emphasis supplied].

[5]Case No. 85-3225-Civ-Aronovitz; the initial brief is docket item number 13 in that case, and the quotation is from page 9 of the brief.

Similarly, Twin and the appellants did not raise the argument that they now raise—that substantive consolidation was a "subterfuge" to take Twin's money—at the hearing on substantive consolidation on July 18, 1985 [Dbt. App. 417].

(i) Thereafter, neither Twin nor either of the appellants posted an appeal bond (as required by the District Court) in order to stay the implementation of the Bank's Plan. Accordingly, the Liquidating Trustee was appointed [Dbt. App. 241] and began to pay creditors with the funds in the Liquidating Trust. If Twin or the appellants truly intended to prevent the use of *Twin's proceeds* to pay allowed claims as provided by the Bank's Plan, it was incumbent upon Twin and/or the appellants to post an appeal bond as required.

(j) On November 22, 1985, the Liquidating Trustee filed his first report, which clearly listed the Twin cash as an asset subject to disposition by the Liquidating Trustee [Dbt. App. 293, 300]. The Bankruptcy Court entered an Order approving the report on November 26, 1985 [Dbt. App. 301-03]. Neither Twin nor either of the appellants took an appeal from that Order.

(k) On December 30, 1985, the District Court remanded the Debtors' appeal from the Confirmation Order back to the Bankruptcy Court for the entry of more detailed findings of fact and conclusions of law [Dbt. App. 309]. Although invited and directed to raise any issue during the remand, the appellants never mentioned the Plan's utilization of Twin's proceeds. The Bankruptcy Court entered detailed findings and conclusions on January 29, 1986, as requested [Dbt. App. 329], reciting again that the Washington Proceeds of approximately $30 million (which included Twin's share) were the Bank's cash collateral [Dbt. App. 344] and were to be used to pay creditors. The District Court affirmed those findings [Dbt. App. 387], noting specifically that the Bank's Plan utilized, "the proceeds of the sale by the debtors

of certain real property owned by them in Washington, D.C. ($32,000,000)" [Dbt. App. 396]. In their appeal to the Eleventh Circuit from that District Court Order,[6] the debtors have not disputed that determination by the District Court.

(l) Nonetheless, the appellants asked the Bankruptcy Court to "clarify" that Twin's portion of the Washington Proceeds could not be used by the Liquidating Trustee to pay creditors [Dbt. App. 244]. When the Bankruptcy Court ruled against the appellants and they initiated this appeal, however, they did not obtain a stay pending the appeal. Accordingly, the Liquidating Trustee has continued to use Twin's proceeds (as provided by the Bank's Plan) to pay creditors.

4. Twin never appeared separately in the bankruptcies below. In keeping with its membership in the Gould Group and its 100% ownership by debtor/appellant Holywell, Gould's and Holywell's lawyers always spoke on behalf of Gould and Holywell for Twin (as they continue to do in this appeal). Twin never filed objections to the Bank's Plan, and Gould (as President of Twin) controlled Twin's funds. Gould testified that Twin's funds *had* to be paid to Holywell:

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 North 17th Street.

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[6]Case No. 86-5286, pending in the Eleventh Circuit.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It *has to go to Holywell* as dividends.

[C.P. No. 385h, pages 49-50, emphasis supplied].

The foregoing facts, omitted from the appellants' "Statement of the Case", demonstrate that the appellants always understood and agreed that Twin's assets were under the control of the appellants and would be used to pay creditors under the debtors' plans *or* the Bank's Plan, whichever the Bankruptcy Court confirmed.

ARGUMENT

I. The Bankruptcy Court Ruled Correctly That Twin's Funds Were Part of The Liquidating Trust.

A. Substantive Consolidation.

The debtor/appellants argue that the Bankruptcy Court, "in effect sanctioned the substantive consolidation of Twin Development with the Debtors" [appellants' brief at 14]. That is not correct.

Substantive consolidation is an equitable doctrine, available under Section 105 of the Bankruptcy Code, under which, "the assets and liabilities of different entities may be consolidated and dealt with as if the assets were held by, and the liabilities were incurred by, a single entity". 5 *Collier*

on Bankruptcy ¶1100.06[1] at 1100-32 (15th ed. 1985). The Bank's Plan provided for the substantive consolidation of the five debtors, but never purported to make Twin liable for the obligations of the debtors. Instead, the Bank's Plan did what the debtors' plans had proposed to do, and what the creditors themselves could have ultimately done in the absence of the bankruptcies—the Bank's Plan provided that Twin's share of the Washington Proceeds would be used to pay creditors.

The appellants have already attacked substantive consolidation on appeal, and have lost that appeal [Dbt. App. 399-404]. District Judge Aronovitz "studiously examined" that issue, and concluded that substantive consolidation, "was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous" [*Id.*]. That opinion characterizes the evidence in the record justifying substantive consolidation as "strong and convincing" [Dbt. App. 401]. The Order affirming substantive consolidation is "law of the case", and may not be attacked again by the debtor/appellants in the District Court. *Hildreth v. Union News Co.*, 315 F.2d 548, 550 (6th Cir. 1963); *Dade County Classroom Teachers' Ass'n. v. Rubin*, 238 So.2d 284, 289 (Fla. 1970), *cert. den.*, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 623 (1971).

The debtor/appellants have noted in their brief that substantive consolidation is, "one of the issues on appeal to the Eleventh Circuit",[7] so it is doubtful that this Court can even consider the issue.

Twin was not "substantively consolidated" with the debtors. Twin's obligation and liability to pay its share of the Washington Proceeds to Holywell—expressly and repeatedly admitted by the debtors—was a property right of Holywell's. When the Plan was consummated on October 10,

[7]Appellants' initial brief at page 15, note 7.

1985, the Liquidating Trustee acquired and utilized that property right.

The creditors of debtors Gould, Holywell, MCLP, and Chopin could have reached Twin's share of the Washington Proceeds. Under Section 620.63, Fla.Stat., Gould was personally liable to all creditors of MCLP and of Chopin, as well as to all of his own creditors.[8] All such creditors—MCLP's Chopin's, and Gould's—could have levied or executed upon his 100% ownership interest in Holywell. In turn, all of those creditors *and* all of Holywell's creditors could have levied or executed upon Holywell's 100% ownership interest in Twin, which included the $13.1 million portion of the Washington Proceeds. Thus, the provisions of the Bank's Plan and the actions of the Liquidating Trustee were entirely consistent with Florida's creditors' rights law, and did not prejudice Twin. The appellants argue that the use of Twin's funds "would be grossly unfair to Twin's creditors and equity holders", but of course:

(a) The appellants lack standing to complain about hypothetical or supposed injuries to creditors that are not before this Court. [Dbt. App. 406; *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983)]; and

(b) The only "equity holder" of Twin is debtor/appellant Holywell, which has already taken and lost an appeal from the confirmation and operation of the Bank's Plan.

All of the "substantive consolidation" cases raised by the appellants were taken into account by District Judge Aronovitz in approving the confirmation of the Plan. A case-by-case analysis of the authorities cited by the appellants

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[8]Because Gould was a general partner of debtors MCLP and Chopin, which are both Florida partnerships.

would serve no purpose here, because they are the same authorities that have been cited (a) by the debtors in their unsuccessful appeal from the order of substantive consolidation and from the Confirmation Order, (b) by District Judge Aronovitz in approving substantive consolidation and the other aspects of the Bank's Plan attacked by the debtors, and (c) by the debtors in their further appeal from Judge Aronovitz's Order to the Eleventh Circuit. In addition, the Plan's use of Twin's portion of the Washington Proceeds did not amount to "substantive consolidation" as argued by the debtors. Twin's existence as a corporation, its other assets, and all of its liabilities were unaffected by the Plan. Only the funds that "had" to be dividended to Holywell[9] and that were part of the Bank's cash collateral were affected by the Plan. That is far short of "substantive consolidation".

B. **The Guarantees and Stock Pledge.**

The appellants next argue that their own guarantees and Holywell's pledge of Twin's stock to the Bank, "did not mean [the Bank] could simply grab the Twin assets" [appellant's initial brief at 26].

The Bank did not "grab the Twin assets". Twin's share of the Washington Proceeds has been applied to pay the Gould Group's creditors, which is a result that the creditors could have obtained by execution against Gould and Holywell. The Bank's Plan did precisely what the debtors repeatedly proposed to do—it used the Washington Proceeds to pay the Gould Group's creditors. The cash collateral Order [Dbt. App. 77] brought Twin's portion of the Washington Proceeds under the jurisdiction of the Bankruptcy Court. If Twin had an objection to that result (which Twin plainly did not, since it was controlled by Holywell and Gould and neither appealed the Order), it was required to file an appeal on or before

[9]See the testimony of appellant Gould at page 12 of this brief.

January 10, 1985. Bankruptcy Rule 8002. Twin failed to do so, and thereby abandoned any right to dispute the Bankruptcy Court's jurisdiction over Twin's share of the Washington Proceeds or to claim that the debtors had no control over those funds.

II. This Appeal Is Moot.

In the absence of an order staying the implementation of a plan of reorganization or disposition of property, an appeal becomes moot. *In re Cada Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981). The same is true with respect to an unstayed appeal from a plan that has been substantially consummated. *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981).[10] The Bank's Plan has been substantially consummated as defined by 11 U.S.C. §1101(2), as specifically determined by the Bankruptcy Court [Dbt. App. 367-68, Paragraph 57], and as admitted in open court by appellant Gould himself [Bank's App. 1]. There is simply no way that the Liquidating Trustee can identify Twin's portion of the Washington Proceeds or reclaim it from the creditors who were paid over the past year (consummation of the Plan began over a year ago, on October 10, 1985). Nor can Twin simply recover its $13 million and walk away into the sunset, as the appellants apparently hope and urge.[11] The use of that money by the debtors was a material aspect of the Bank's Plan. The Bank would not have (a) released its lien over that

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[10]See also *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). That opinion notes that the failure to obtain a stay is fatal, "to the extent reversal of the confirmation order would require the invalidation of good faith transfers." *Id.* at 1147.

[11]Such a result would allow over $13 million to leave the five estates out a "side door" before all creditors were paid and the five cases closed. Because of Gould's direct and complete control over Twin, he would in effect receive the $13 million as an equity distribution before payment of all creditors.

cash and the balance of the Bank's cash collateral, (b) waived the default interest differential on its construction loans to the debtors (several million dollars), or (c) bought the Miami Center Project for $255.6 million, including approximately $14 million of *new* cash, if Twin's funds had been unavailable as a matter of law for the payment of other creditors. Since the sale closed on October 10, 1985 and Twin's portion of the Washington Proceeds was turned over to the Liquidating Trustee as of that date pursuant to the terms of the Plan and of that sale, it is now too late to unwind the transaction. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle Co., Inc.*, 735 F.2d 1294 (11th Cir. 1984).

Mootness is jurisdictional, and this appeal should be dismissed on that basis. *Locke v. Board of Public Instruction of Palm Beach County*, 499 F.2d 359, 363-64 (5th Cir. 1974).

CONCLUSION

Having lost a direct attack on the Bank's Plan in this Court [Dbt. App. 387], the debtors are now attempting to raise an argument on behalf of one of their many wholly-owned and totally-controlled subsidiaries [Bank's App. 2]. For their own purposes, the debtors repeatedly represented that Twin's share of the Washington Proceeds were available to Holywell and for the payment of the Gould Group's creditors. In seeking permission to sell the Washington, D.C. properties that generated Twin's cash, the appellants told the Bankruptcy Court that "the immediate cash infusion" would inure to their benefit and would be "an essential part of the reorganization" [Dbt. App. 3].

Now the appellants want to argue that Twin was outside the sphere of the bankruptcies, and that the Bankruptcy Court and the Bank's Plan could not deal with Twin's share of the Washington Proceeds, even though those funds "had"

to be paid to Holywell [see Mr. Gould's testimony at page 12 of this brief].

The Bankruptcy Court correctly rejected that transparent change in position by the debtors. Moreover, District Judge Aronovitz has already heard and rejected the appellants' objections to the Bank's Plan; this appeal is merely another bite at the apple. Accordingly, it is respectfully submitted that this Court should dismiss this appeal as moot or, in the alternative, affirm the Bankruptcy Court's Order below.

Respectfully submitted,

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Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss Appeals as Moot was furnished by overnight courier this 7th day of November, 1986 to Fred H. Kent, Jr., Esq., Kent, Watts & Durden, 1400 Florida National Bank Tower, 225 Water Street, Florida 32202, and Raymond Bergan, Esq., Williams & Connolly, 839 Seventeenth Street N.W., Washington, D.C., 20006, as attorneys for appellants; and by messenger to Irving M. Wolff, Esq., Holland & Knight, 1200 Brickell Avenue, Miami, Florida 33131, as attorney for the Liquidating Trustee.

/s/ [illegible], for
Vance E. Salter

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Case No. 84-01591-BKC-TCB
Case No. 84-01592-BKC-TCB
Case No. 84-01593-BKC-TCB
Case No. 84-01594-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,
Debtors,

ORDER ON REMAND

The District Court Order of Remand dated December 30 reached this court on January 6 (C. P. No. 1145). It requires that one or more hearings be held, proposed findings and conclusions be entertained, and that this court not later than January 29:

> "make and enter such findings of fact and conclusions of law as are necessary to provide the District Court with an adequate basis to decide the . . . appeal on the merits."

At a conference held January 14, the debtor requested and on January 18 the court held an evidentiary hearing to receive additional evidence on three issues: (a) the value of the Miami Center Project, (b) the value to the estate of a lawsuit pending before Judge Hoeveler, and (c) amount of the Bank's lien. The parties also re-

quested leave to submit their proposed findings and conclusions by January 23. The parties agreed that no other hearings were necessary.

Although counsel for MCJV and O&Y attended both hearings, neither they nor any party other than the debtors and the Bank participated.

On January 23, both the debtors (C. P. No. 1175) and the Bank (C. P. No. 1176) submitted comprehensive and detailed proposed findings and conclusions, respectively 43 and 52 pages in length.[1] In addition, the debtors filed on January 28 the debtors' 22-page response to the Bank's proposed findings and conclusions.

I presume counsel understand what will best assist Judge Aronovitz. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U.S. ——, 84 L.Ed.2d 518, 527 (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the debtors' Response together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906) and the earlier

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[1] Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. § 1129(a) rephrased as mixed

* * * *

Consolidation Order (C. P. No. 840). The earlier order followed one session of the extended confirmation hearing and resolved one bitterly contested element of the confirmation issues. It was not possible, in this case, to hear all the issues and parties during one uninterrupted session.

In a matter of this magnitude, fought as hard as this one has been, it is easy to lose sight of the forest while concentrating on the trees. Neither this review, the additional evidence tendered, nor the subsequent events have caused me to recede from the decisions I reached after spending a year with all the parties and the issues they presented, which I attempted to put into perspective in the Confirmation Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

Findings of Fact

A. *Parties*

1. The debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Pavillon Hotel, retail space between them known as the "Podium",

and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. Miami Center Joint Venture ("MCJV") is a Florida general partnership formed by debtor Gould and Olympia & York Florida Equity Corp. ("O&Y"), a Florida corporation established by a large Canadian real estate development company. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the Phase I Project. Gould and O&Y originally planned to construct Phases II and III of Miami Center on those lots, but disputes and litigation between the two partners prevented any such construction.

4. Holywell Leasing Company ("HLC") and Holywell Telecommunications Company ("HTC") are two of numerous non-debtor subsidiaries wholly owned by debtor Holywell (wholly owned, in turn, by Gould). Gould was president of each at all material times.

5. Over 400 other creditors have an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP, and MCC estates.

B. *Jurisdiction*

6. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. § 157, the standing order of reference in this District, and the Order of Remand.

C. *The Debtors' Plans*

7. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were

nearly identical in form and substance [C.P. No. 466-470].

8. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for $260 million;

(b) the payment of undisputed claims from approximately $32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. § 363, subject to the Bank's first lien);

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hoeveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. § 510(c).

D. *Objections to the Debtors' Plans*

9. Objections to the debtors' amended plans were filed by:

(a) O&Y [C.P. No. 533], upon the grounds that:

(1) the debtors' plans were based on a "wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(2) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

> The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations,

commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.

[*Id.*, Paragraph 3];

(3) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properities concerned and a discharge of the claims of creditors." [*Id.*, Paragraph 5];

(4) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(5) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(6) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements covering certain furniture, fixtures and equipment (the "FF&E"); and

(7) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation" [Id., Paragraphs 13 and 14].

(b) the Bank [C.P. No. 535], upon the grounds that:

(1) the debtors' plans were misleading, and were based upon contingencies unlikely to materialize and requiring years of litigation to resolve;

(2) the debtors' plans failed to meet the "best interest of creditors" (Section 1129(a)(7)), feasibility (Section 1129(a)(11)), and "cram down" (Section 1129(b)(1)) requirements under the Code; and

(3) the debtors' "equitable subordination proposal in respect to the Bank's liens was moot in light of this Court's March 20, 1985 decision [C.P. No. 20 in Adv. Pro. No. 85-0160-BKC-TCB-A] holding that two releases executed by the debtors in favor of the Bank and its participating lenders) barred the debtors' claims of wrongdoing.

(c) the MCC and MCLP Creditors' Committees [C.P. No. 567], upon the grounds that:

(1) the debtors' plans were not feasible, because the Hadid contract was "not a true and valid offer";

(2) the matter of equitable subordination of the Bank's claim had been adjudicated against the debtors;

(3) the debtors' plans would eliminate the estates' equity because of the accrual of interest on the Bank's mortgages during the litigation and the Hadid contract delays;

(4) the debtors' plans unfairly discriminated against creditors and were not fair and equitable;

(5) the debtors failed to comply with 11 U.S.C. § 1129 (a) (5) (A) (i) ; and

(6) the debtors made solicitations of creditors through improper "telephone calls and a mailgram, which did not truthfully represent the facts", attempting in bad faith to obtain acceptances, in contravention of 11 U.S.C. § 1126(e).

(d) Julian J. Studley, Inc. [C.P. No. 526], an unsecured creditor, because of the improper classification of its claims and failure to comply with 11. U.S.C. § 1123 (a) (4).

(e) the Holywell Creditors' Committee [C.P. No. 516], upon the following grounds:

(1) the "illusory" nature of the debtors' plans because, "they do not present a binding contract with a purchaser,

but represent merely an option to a real estate broker which can be extended through September, 1985, under the Contract", and the "down payment" was merely a promissory note; and

(2) the debtors' plans would entail substantial delays because of (i) the "study period" and extensions under the Hadid contract and (ii) the litigation involved in the attempt to subordinate the Bank's claims.

E. *The Bank's Plan*

10. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulations nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

11. The central features of the Bank's amended, consolidated plan are:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of $255.6 million, comprised of (i) satisfaction of the Bank"s judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately $30 million), for addition to the new cash generated by the sale of the Miami Center Project (approximately $13.6 million), with the combined funds to

be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately $14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

F. *Objections to the Bank's plan*

12. Objections to the Bank's Plan were filed by:

(a) the Holywell Creditors' Committee [C.P. No. 515], but these objections were subsequently withdrawn by stipulation [C.P. No. 614, paragraph 6];

(b) O&Y [C.P. No. 532, 817a, 871], upon the grounds that:

(1) the Bank's plan assumes title to the MCJV FF&E without adequate and priority payment of sums allegedly due under the FF&E agreements; and

(2) the Bank's plan, "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . . ".

(c) Shutts & Bowen, a creditor and law firm representing the debtors [C.P. No. 537a], upon the grounds that:

(1) the Bank's plan is "unfairly discriminatory and is not fair and equitable" to impaired classes;

(2) the Bank's valuation of assets and claims is erroneous;

(3) the Bank's plan assumes liabilities of MCJV;

(4) the Liquidating Trust is violative of 11 U.S.C. § 1129(5)(A)(i); and

(5) the plan's priority scheme does not comply with 11 U.S.C. § 1129.

(d) MCJV [C.P. No. 808], though comprised of Gould and O&Y, in separate objections alleging that the plan fails to provide proper payment and priority for the MCJV FF&E claims.

(e) the debtors [C.P. No. 534, 545, 580, 849, and 888a], upon the grounds that:

(1) the Bank's plan fails to pay in full for the FF&E;

(2) the Bank's plan deprives mechanics' lien claimants of their security;

(3) the Bank's plan and disclosure statement are misleading;

(4) substantive consolidation would only result in "unjust enrichment" to the Bank and other creditors;

(5) the Bank's plan would cause the limited partners to lose their investment and to become liable for additional taxes;

(6) the District Court Action would be "summarily" dismissed, "without due process of law"; and

(7) the appointment of a Liquidating Trustee violates 11 U.S.C. § 1104(a).

G. *Voting by the Creditors*

13. After the debtors' and the Bank's disclosure statements were approved, and pursuant to this Court's order

[C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

14. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

15. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 6 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. § 1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. § 1129(b).

H. *Establishment of the Bank's Lien*

16. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv. Pro.No. 85-0160-BKC-TCB-A).

17. The debtors sought a stay of the scheduled trial of the lien proceeding (a) initially in the Bankruptcy Court [C.P. No. 3A in Adv.Pro. 85-0160], and (b) then in the District Court Action. Both Courts refused to enter such a stay, and the trial went forward as scheduled.

18. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of $234,342,742.93, plus interest of over $75,000 per day from March 14, 1985, forward [C.P. No. 21 in Adv.Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien. However, since that amount has been embodied in a final judgment [C.P. No. 21 in Adv. Pro. 85-0160] that is now on appeal before the District Court (*Gould et al. v. The Bank of New York, Case* No. 85-2263-Civ-NCR), the Court will not revisit that issue. The Court has also been directed to the debtors' brief in that appeal which states, at page 23, that the debtors, "do not contest that the principal amount advanced by The Bank of New York is $196,711,481.58", exactly the amount set forth in the final judgment [transcript of hearing of January 18, 1986, page 11].

I. *The FF&E Leases*

19. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of two agreements, relating to the FF&E and between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "financing agreements" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv.Pro.No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured

or unsecured), extent, and value of such claims. The Bank also filed an objection to the FF&E claim filed by O&Y and MCJV [C.P. No. 811], which remains pending.

20. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv. Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the priority of MCJV's claim or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan).

J. *Substantive Consolidation*

21. Thereafter, the parties furthered the confirmation process by noticing an evidentiary hearing upon the debtors' objections to the substantive consolidation feature of the Bank's plan. Both sides presented evidence and argument [C.P. No. 844] on the issue.

22. The Court determined, based upon facts and authorities detailed below (Paragraphs 29-41 and 58-67), that substantive consolidation is in the best interest of creditors, is not prejudicial to the debtors, and is appropriate on the record before the Court [Consolidation Order, C.P. No. 840]. Under the plan, the creditors have received or will receive more than they would in liquidation. 11 U.S.C. § 1129(a)(7).

K. *Further Hearings*

23. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested.

24. However, pursuant to the Order of Remand and the written request of counsel for the debtors, a further evidentiary hearing was conducted on January 18, 1986, for the submission of evidence regarding:

(a) the value of the Miami Center Project;

(b) the value or "cost/benefit" of the District Court Action; and

(c) the calculation of the Bank's lien.

L. *Findings As to the Debtors' Plans*

25. At the instance of the Bank, the deposition of the President of Hadid Investment Group, Inc. (the proposed purchaser of the Miami Center Project for $260 million under the terms of the debtors' plans), Mohammed A. Hadid, was taken on April 19, 1985 [C.P. No. 649]. Hadid's testimony and the deposition exhibits demonstrate, and the Court finds, that:

(a) the Hadid contract had no fixed closing date, and was little more than an open-ended option;

(b) Hadid was still searching for a principal to finance or acquire the Project under the contract, and did not have the wherewithal independently to close the purchase;

(c) Hadid and any such principal would not deal with the Project until the "cloud of bankruptcy" was removed; and

(d) the "down payment" was a mere promissory note of dubious enforceability.

26. As is evident from the results of the voting (see Paragraphs 14 and 15, *supra*), numerous classes of creditors voted against the debtors' plans.

27. The "equitable subordination" of the Bank's judgment, as proposed by the debtors, would not have been permitted because the debtors had specifically released any

and all such claims against the Bank and its participating lenders [C.P. No. 20 in Adv.Pro. 85-0160].

28. The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the *ad valorem* tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (Trusthouse Forte), O&Y, the leasing agent (Julian J. Studley, Inc.), prospective tenants, and the Bank—would have continued or even increased under the debtors' plans, such that the funds of the estates otherwise available for the payment of claims to creditors would have been substantially eroded by legal fees and other costs of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]. It is likely that consummation of the debtors' plans would have been followed by liquidation or by a need to further reorganize. 11 U.S.C. § 1129(a)(11).

M. *Findings on Substantive Consolidation As Proposed by the Bank's Plan.*

29. All of the Creditors' Committees supported substantive consolidation. No creditor (except for those controlled by Gould) objected to substantive consolidation.

30. Gould's testimony at deposition, to which the Court was directed at the hearing on substantive consolidation [C.P. No. 385h], was:

> Q: Is it fair for us to conclude that Holywell, the parent company, is the ultimate beneficiary of any and all profits that these companies make?
>
> A: [Mr. Gould]: Yes, it is. [Page 31].
>
> * * * *
>
> Q: Has it been customary for these interrelated companies to move money back and forth?
>
> A: Yes. [Page 202].
>
> * * * *

Q: Did either of these two corporations operate at a profit?

A: All of them did.

Q: All of that money was dividended up to Holywell?

A: Yes.

Q: Then you, as the sole stockholder in Holywell, got a dividend from Holywell?

A: No. All the funds during the past four years have been loaned to this project.

Q: Holywell—

A: All of the funds that Holywell has earned during the past four years have been loaned to the Miami Center Limited Partnership. [Page 55].

Moreover, the debtors specifically asked the Court to approve (and the Court did approve) as undisputed liabilities of the debtors, payments to terminated employees of Holywell's wholly-owned subsidiaries: Parkwell, Inc.; Parkwell of Florida; Holywell Construction Co.; Holywell Telecommunications Co.; Florida Viking Properties; Orion Engineering Services; Whitehall Building Services; Whitehall Security Corp.; and Holywell Hotels, Inc. [C.P. No. 609, Exhibit "B"]. All such employees performed services for the Miami Center Project owned by debtors MCLP and Chopin.

31. The debtors' schedules [C.P. No. 275-278] show, and the debtors have never disputed that:

(a) Gould owns 100% of debtor Holywell;

(b) Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62 and 620.625, Florida Statutes);

(c) Holywell owns 100% of debtor MCC and of Holywell's numerous other subsidiaries; and

(d) MCC is also jointly and severally liable for all debts of MCLP and Chopin, because MCC is a general partner of each.

32. The debtors' outside accountant testified, and the Court thus finds, that Holywell's financial statements were consolidated with those of debtor MCC [C.P. No. 844, pages 37-38].

33. The debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors. Many creditors filed claims against the wrong debtor or debtors as a result. For example:

(a) Holywell Construction Company, a wholly-owned subsidiary of debtor Holywell, was "an agent of [debtor] Miami Center Limited Partnership" [C.P. No. 788, page 37; see also page 100].

(b) Holywell Real Estate Corporation, another of the many wholly-owned subsidiaries of debtor Holywell, entered into a contract for work at Miami Center that was always to be paid by debtor MCLP [Id. at page 45; the Court held debtor Holywell liable].

(c) The State of Florida, Department of Labor, believed its claims were against "Holywell Hotels, Inc., trading as Pavillon Hotel", rather than against debtor Holywell [Id. at page 99].

(d) Debtor MCLP acknowledged indebtedness for purchases made by Whitehall Security Corporation, another wholly-owned subsidiary of debtor Holywell [Id. at page 104].

(e) Debtor Holywell furnished credit information in support of credit extended for purchases by debtor MCLP, and was invoiced for those purchases [Id. at 123-29].

(f) A Miami law firm invoiced debtor Holywell for services allegedly obtained for debtor MCLP, apparently by Holywell Construction Company [Id. at 147-49].

34. The creditors filed overlapping claims because of their confusion. The debtors objected to over 300 claims on the grounds that the claims were filed against the wrong debtors [C.P. No. 577-579, 584-86, 588, 589].

35. The schedules claim the following inter-company indebtedness, among others, between various debtors and their wholly-owned subsidiaries:

(a) MCLP owes Holywell $4,080,395.21.

(b) MCLP owes Holywell's wholly-owned subsidiary "Charleston Center Corp." $2,067.801.71.

(c) MCLP owes debtor Chopin $11,528,389.33.

(d) MCLP owes Holywell's wholly-owned subsidiary "Holywell Construction Co." $500,832.12.

(e) MCLP owes Holywell's wholly-owned subsidiary "Holywell Hotels, Inc." $1,923,862.81.

(f) MCLP owes Holywell's wholly-owned subsidiary "Holywell Management Co." $222,004.55.

(g) MCLP owes Holywell's wholly-owned subsidiary HTC $64,489.59.

(h) MCLP owes Holywell's wholly-owned subsidiary "Orion of Washington" $499,333.00.

(i) MCLP owes Holywell's wholly-owned subsidiary "Orion Engineering Services" $275,704.74.

(j) MCLP owes Holywell's wholly-owned subsidiary "Parkwell, Inc." $114,249.21.

(k) MCLP owes Holywell's wholly-owned subsidiary "PBA Architects, Inc." $856,709.17.

(l) MCLP owes Holywell's wholly-owned subsidiary "Pietro Belluschi, Inc." $300,833.

(m) MCLP owes Gould $2,215,539.09.

(n) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Building Services, Inc." $26,385.47.

(o) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Security Corp." $1,543,938.86.

(p) Gould owes Holywell $1,750,000 plus interest.

(q) Holywell is owed the following by its wholly-owned subsidiaries:

Charleston Center Corp.	$1,814,066.09
PBA, Inc.	1,201,578.97
TBG Institute	1,199.00
Parkwell of Florida	1,937.54
Whitehall Security Corp.	2,535.35
Whitehall Building Services, Inc.	7,617.15
Orion Engineering	3,359.28
Holywell Management	59,724.88
Racing Club	82,597.81
Holywell Hotels, Inc.	5,000.00
Holywell Trading	834.35
Holywell Real Estate	137,784.49
Holywell Telecommunications Co.	471,115.39
Holywell Insurance Company	10,541.46
Studley/Holywell Associates, Inc.	30,493.08

36. The foregoing intercompany indebtedness exceeds $31,800,000. Since Gould controlled both the purported obligor and the obligee with respect to each such liability, and since he admitted on deposition that he advanced all of the income from all of the debtors through Holywell to assist with MCLP's development of the Miami Center Project [See Paragraph 30, *supra*], such advances cannot be characterized at arms'-length or as founded upon adequate consideration.

37. Exhibit 4, Question 19b, in Holywell's Statement of Financial Affairs [C.P. No. 275] indicates that Gould paid himself (because he owned and controlled Holywell) $1,051,844.67 from debtor Holywell's cash during the 11-

month period before the bankruptcy, and that Holywell made a loan of $1,750,000 to Gould on October 14, 1983. During the hearing on this issue on July 18, 1985, Holywell's chief financial officer conceded [C.P. No. 844, page 57, lines 19-24] that the Holywell-Gould loans were not evidenced by a written note. Schedule B-2 to the Statement of Financial Affairs shows that Holywell owned 100% of 19 different subsidiaries (only one, MCC, is a debtor), and that 14 of those subsidiaries allegedly owed money (about $3.8 million) to Holywell.

38. MCLP's Statement of Financial Affairs [C.P. No. 276] also reflects numerous inter-debtor transactions and debts (most are summarized at Paragraph 35, *supra*). MCLP, though admittedly in default under its loans with the Bank at the time, paid Holywell over $1.2 million [*Id.*, Exhibit 13(a)] in the seven months preceding the bankruptcies.

39. MCC's schedules [C.P. No. 277, Schedule B-2] show that Holywell owed MCC $898,779, and that MCC (wholly owned by Holywell) owned a 47.88% partnership interest in MCLP and a 64% partnership interest in debtor Chopin. The schedules also confirm [Schedule A-2] that MCC is liable as a general partner for the debts of MCLP and of Chopin.

40. Gould's schedules [C.P. No. 278, Schedule A-1] show claims against him by the IRS of over $2.5 million because (a) Gould was on officer of debtor Holywell's wholly-owned subsidiaries Holywell Construction Company and Holywell Hotels, Inc., and (b) he failed to cause those entites to pay federal withholding taxes. The schedules also admit [Schedule A-2] Gould's liability as general partner for MCLP's debts (other than any nonrecourse mortgages) and for Chopin's debts. Finally, Gould listed ownership [Schedule B-2] of 17% of MCLP and 36% of Chopin.

41. Thus, debtor Gould owned all of debtor Holywell, which in turn owned all of debtor MCC. Gould therefore

owned, directly or indirectly through Holywell and MCC, general and limited partnership interests constituting 64.88% of MCLP and 100% of Chopin. The debtors have never disputed that Gould personally controlled all five of the co-debtors.

N. *Findings on Classification Under the Bank's Plan*

42. The objections relating to the classification structure of the Bank's plan came only from entities which Gould controlled (MCJV, of which he was "managing venturer" and general partner, and HTC and HLC, of which he was president—and which he owned through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

43. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of general unsecured creditors that were not affiliated with Gould (Class 6). The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because;

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has recourse to Gould's equity interest in MCJV's valuable real estate, while the unaffiliated unsecured creditors have no such recourse (the MAI appraisal filed by the debtors indicated that the four unimproved parcels owned by MCJV were worth $104 million [C.P. No. 149, Exhibit "C"; also of record at C.P. No. 822, Exhibit "A"], while the liabilities of MCJV have been represented to be approximately $60 million;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has recourse against Gould's

50% equity in MCJV, for O&Y's claims against the debtors.

44. Similarly, the claims of HTC and HLC (each wholly owned by debtor Holywell and controlled by Gould), assigned to Class 8, are substantially dissimilar to the claims of the unaffiliated, Class 6 unsecured creditors. 100% of any payment to HTC or HLC directly benefits (and is readily available to) debtors Holywell and Gould. Payments to unaffiliated creditors, on the other hand, do not result in any other direct or indirect benefit to any debtor.

45. The limited partners of MCLP hold equity interests rather than claims, and were assigned to Class 9. Such interests are not substantially similar to the claims of any of the senior classes under the Bank's plan.

O. *Findings on Equitable Subordination*

46. The entities affiliated with Gould and objecting to classification junior to the claims of general unsecured creditors have consistently maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. The Order of Remand directed the Court to enter detailed findings on the issue. As the conclusions of law demonstrate (see Paragraphs 68-74, *infra*), the Court approved the junior classification accorded such claims by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. § 1122) that had no such affiliation with the debtors.

47. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV, O&Y, HTC, and HLC claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of enormous sums of money to himself (see Paragraph 37, *supra*), at a time when he was refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) conflicts of interest resulting from his control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease; and

(c) his failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company (see Paragraph 40, *supra*), with the result that his estate was charged for the $2.5 million in penalties under 26 U.S.C. § 6672, to the detriment of creditors.

48. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. All such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 62(a) in the Conclusions of Law which follow).

P. *Valuation of the Project*

49. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at $260.5 million (land and buildings) plus $14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of $260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: $210 million for the structures [Exhibit "E" to C.P. No. 378] and $23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of $233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at $255.6 million as of November 15, 1984.

50. Upon remand, the parties presented the testimony of their respective appraisers. Each appraiser adhered to his prior estimate of value [transcript of hearing of January 18, 1986 (not yet docketed), pages 62-108].

51. Upon the record before the Court prior to confirmation, the Court found that the Bank's proposed purchase price of $255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over $30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

> The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal ($255.6 million, including FF&E) are between

the debtors' liquidation estimate ($233.4 million, without FF&E) and the debtors' MAI appraisal ($260.5 million without FF&E, or $275 million with FF&E). The two appraisers agree that the income approach to value should be given the greatest weight. The debtors' appraisal computed a value of $267 million under that approach [C.P. No. 392, page 99], while the Bank's appraiser's comparable estimate was $255.6 million. The difference between the values, less than 5%, apparently occurred because the debtors used estimated taxes and assessments of $4 million per year, while the Bank's appraiser used the actual taxes and assessments imposed by Dade County and the City of Miami (approximately $5.2 million per year) [transcript of hearing of January 18, 1986 (not yet docketed), page 91].

52. The Court has not been presented with any new evidence upon remand that would alter the findings in the Confirmation Order. The evidence upon remand does, however, make it clear that the debtors are taking inconsistent positions for purposes of these proceedings on the one hand and Dade County property tax proceedings on the other. The County appraised the facilities at $183.7 million in 1984, while the debtors' "good faith estimate" of value for the Project was only $87 million [see Exhibit "A" to C.P. No. 491, "Debtors' Emergency Motion for Authorization to Pay Good Faith Deposit on 1984 Dade County, Florida Real Estate Taxes", also marked as Exhibit "D" at the hearing of January 18, 1985].

53. Based upon all of the foregoing, the Court finds that the $255.6 million purchase price offered by the Bank for the Project (including the FF&E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

Q. *District Court Action*

54. In the Confirmation Order, the Court noted the litigiousness of the parties:

> If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The District Court Action is an illustration of that point. In the memorandum decision respecting the releases signed by each of the debtors [C.P. No. 20 in Adv.Pro. 85-0160], this Court held that the releases barred both future and existing claims relating to the transactions between the debtors and the Bank. Notwithstanding the releases and this Court's ruling on the releases, however, the debtors continued to maintain the District Court Action.

55. It is not surprising that the Bank required dismissal of the District Court Action as a condition to close the purchase under its Plan. It would make little sense for the Bank to invest new money, discharge its judgment lien, and release millions of dollars of cash collateral, only to remain exposed to continuing litigation costs (probably unrecoverable from the debtors). In light of the releases, no significant value can be assigned to the District Court Action; to the contrary, the continuance of the suit is a significant detriment because of the first-priority attorneys' fees that would have to be incurred to do so.

56. This analysis was confirmed upon remand by the expert testimony of a seasoned, local trial lawyer (and former Florida Circuit Court Judge), presented by the

Bank upon remand [transcript of hearing of January 18, 1986 (not yet docketed), pages 34-39]. I find that the District Court Action has no significant value to the debtors.

R. *Consummation of the Bank's Plan*

57. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over $2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liqui-

dating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

Conclusions of Law

S. *Substantive Consolidation*

58. Substantive consolidation, derived from this Court's general equitable powers under 11 U.S.C. § 105, is a case-by-case inquiry. 5 *Collier on Bankruptcy*, ¶ 1100.06 at 1100-33 (15th ed.). In substantive consolidation cases, "the relationship between entities with respect to which consolidation is sought is far more important than the nature of such entities". *Id.* Thus it is not significant that the debtors sought to be consolidated are an individual, two partnerships, and two corporations.

59. Certain objective criteria should be considered in evaluating whether substantive consolidation is warranted:

(a) The presence or absence of consolidated financial statements;

(b) The unity of interests and ownership between various corporate entities;

(c) The existence of parent and intercorporate guarantees on loans;

(d) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

(e) The existence of transfers of assets without formal observance of corporate formalities;

(f) The commingling of assets and business function; and

(g) The profitability of consolidation at a single physical location.

In Re Donut Queen, Ltd., 41 B.R. 706, 709 (Bktcy., E.D.N.Y. 1984).

60. However, "there is no one set of elements which, if established, will mandate consolidation in every instance." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bktcy., D. Mass. 1982). Instead, "the enumerated factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice the moving creditor alleges it suffers from debtor separateness". *In re Donut Queen, supra*, at 709-10.

61. The Court also may approve substantive consolidation when the expense and difficulty of determining intercompany claims, liabilities, and ownership of assets is substantial. *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d. Cir. 1966); *In re Nite Lite Inns*, 17 B.R. 367, 371 (Bktcy. S.D. Cal. 1982).

62. On the facts established here (Paragraphs 29 through 41, above), substantive consolidation is appropriate. Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:

(a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), (ii) MCC's assets (because of MCC's role as a general partner), (iii) Holywell's assets (net of its liabilities), by levying upon Gould's ownership of 100% of the stock of Holywell, and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC. The pertinent provisions of Florida's partnership laws are:

(1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.

(2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:

(i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.

(3) *620.63 Nature of partner's liability.* All partners are liable:

(i) Jointly and severally for everything chargeable to the partnership under §§ 620.62 and 620.625.

(b) The foregoing statutes, which extend to breaches of contract by Gould, also make MCLP and Chopin responsible for any liabilities of Gould incurred in connection with the Miami Center Project.

(c) Similarly, a creditor of Holywell ultimately could reach (i) MCC's assets (net of its liabilities), because MCC is 100% owned by Holywell, (ii) MCC's ownership, in turn, of 47.88% of MCLP and 64% of Chopin, (iii) Gould to the extent he acted as director or president of Holywell to misapply Holywell's funds (see Paragraph 37, above), and (iv) MCLP because of Holywell's alleged ownership of a claim for over $4 million against MCLP (see Paragraph 35(a), above).

(d) Finally, creditors of MCC and Chopin eventually could reach those debtors' partnership interests in MCLP

and therefore the net assets of MCLP itself (under Sections 620.62 and 620.625, Florida Statutes, *supra*), and a creditor of Chopin could reach the assets of both MCC and Gould (because each is a general partner of Chopin).

63. The Court found [C.P. No. 844, page 97], that the alternative to substantive consolidation, "would appear to be an unncessarily circuitous, time-consumming, and expensive exercise that might conceivably lead to the diversion of some assets which, under the principles of law as I understand them, ought to be available for the satisfaction of these obligations". In short, if the creditors of the five separate estates seek to assert their claims against the primary obligors, the other estates which have contingent or secondary liability under Florida law for those claims may be closed (and any residue diverted or misapplied) before the primarily liable estate is exhausted. Substantive consolidation avoids the unfairness inherent in such a result.

64. Analyzing the seven factors enumerated in *In re Donut Queen*, *supra*, the Court concludes that:

(a) Consolidated financial statements were prepared as to Holywell, MCC, and MCC's interests in Chopin and MCLP (see Paragraphs 32 and 39, *supra*). In addition, even the debtors' bi-weekly debtor-in-possession reports were prepared on a consolidated basis during the period before confirmation [see, for example, C.P. No. 423].

(b) There is a single common element of interest, control, and ownership of all five debtors: Theodore B. Gould.

(c) The debtors' schedules reflect numerous cross-guaranties of loans and other obligations of the debtors. In particular, all five debtors guaranteed all of the Bank's advances to MCLP and to Chopin (totalling over $240 million in principal and interest).

(d) The inter-company debts, in excess of $31.8 million, would require substantial accounting and legal expenditures to investigate and adjust. The costs of such an investigation would delay payments to unaffiliated creditors and would reduce the amount available to pay creditors. In light of the joint and several liability of several of the debtors under Florida law, such expenditures are not warranted.

(e) Gould operated the debtors without regard to their separate identities. He caused Holywell, for example, to advance $1.75 million to him without the formality of even a promissory note (see Paragraph 37, *supra*). He testified to numerous pre-petition transfers among the debtors and their affiliates [C.P. No. 385h, page 202].

(f) Business functions and assets were commingled. Certain debtors regularly paid obligations and performed services for other debtors and their affiliates, instead of letting the beneficiary pay or perform directly [C.P. No. 385h, pages 45, 55, 67-69, 141].

(g) The debtors can operate (and are operating) successfully at a single location. Having announced an intention to leave Miami, the debtors' single office is now in Charlottesville, Virginia [C.P. No. 844, page 50].

65. Each of the seven factors supports substantive consolidation in this case. Moreover, there is no prejudice to the creditors. The creditors did not object to substantive consolidation, and the Creditors' Committees supported that aspect of the Bank's plan.

66. The debtors have claimed prejudice, but have not proven it. At the hearing on July 18, 1985 [C.P. No. 844, page 68], the debtors indicated no objection to consolidation except in the case of Holywell's consolidation with MCLP:

> [The Court]: . . . if the—well, let me ask a preliminary question—the nub here, the serious problem

> and the only serious problem, I take it, that the debtor has with consolidation is the attempted consolidation of Holywell and MCLP?
>
> [Debtors' Counsel]: That's correct, and Holywell is the one objecting.

The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes" [C.P. No. 580, page 2].

67. Based upon all of these factors and the authorities previously cited, and in the exercise of its equitable powers under Code Section 105(a), the Court finds that substantive consolidation in the minimal form proposed by the Bank is equitable, is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors. As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue business, after discharge. The debtors will not disappear in a merger-like consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtor's assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labelled that aspect of its plan as "substantive consolidation." The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. The need for credi-

tors to file such claims and to trace assets is completely attributable to the labryinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.

T. *Classification*

68. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

69. The creditors that have objected to a junior classification hold claims that are markedly dissimilar, both as to the ultimate effect of payment of the claim and as to the special property held by the claimant (see Paragraphs 42 through 45 above). In the case of MCJV:

(a) Payment of MCJV's claim will benefit debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent that O&Y, a non-debtor is benefitted) and equity (to the extent that a debtor, Gould, is benefitted.

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at $104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV may be required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bktcy. S.D. Fla. 1981), *aff'd* 17 B.R. 926, 928-29 (S.D. Fla. 1982). *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bktcy. S.D. Fla. 1983).

70. In the case of HTC and HLC, both are wholly-owned subsidiaries of a debtor and are completely controlled by Gould. It would be inequitable to permit such claimants to share ratably with unaffiliated unsecured creditors. To do so here would be to violate the absolute priority rule by permitting a debtor and its equity interests to share equally and in parity with an unsecured creditor. In view of Gould's undisputed control of these claimants, they were properly classified below the general unsecured creditors.

71. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's ownership interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

72 Each of these objecting affiliated creditors is an "insider" under 11 U.S.C. § 101(28)(A) (subparagraph (ii), as to MCJV; subparagraph (iii), as to O&Y; and subparapraph (iv) as to HTC and HLC). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bktcy. E.D. Va. 1981); *In re Toy &*

Sports Warehouse, 37 B.R. 141 at 152 (Bktcy. S.D.N.Y. 1984)

73. The debtors' proposed plans also accorded a junior priority to the claims of "affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV, HTC, and HLC [C.P. No. 466-470, Exhibit "A", pages 1-2].

74. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of Gould-controlled equities. The claims of the Gould-controlled entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. § 1122(a).

U. *Equitable Subordination*

75. Based upon the Court's findings with respect to Gould's conduct (Paragraphs 46-48), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV, O&Y, HTC, and HLC warrant equitable subordination because Gould's misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law and the law of agency. MCJV and O&Y themselves alleged such misconduct in their objections to the debtors' plans (Paragraph 9(a)(2), 9(a)(7), above). On the record here, Gould will not be permitted by this Court to receive distributions before, or even on a parity with, the unsecured creditors.

V. *District Court Action*

76. The Court has performed the "cost/benefit" analysis of the District Court Action, as suggested by the

debtors. *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980); *TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

77. The Court concludes (see Paragraphs 54-56) that the claims asserted in the District Court Action are barred (a) by the releases executed by the debtors and (b) by this Court's memorandum decision [C.P. No. 20 in Adv. Pro. 85-6160], which bars re-litigation of the release issue. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984). Based upon that conclusion and the testimony of the only expert witness to address the matter, the District Court Action is not worth the cost of prosecution.

78. The Bank's plan and the Liquidating Trustee may lawfully dismiss the District Court Action. The District Court Action is an asset of the debtors' estates subject to the jurisdiction of this Court. 11 U.S.C. § 541(a)(1); *In re AutoWest, Inc.*, 43 B.R. 761, 763 (D. Utah 1984). The Bank's plan provided that ownership of the District Court Action passed to the Liquidating Trustee, who thereby acquired the power to pursue, abandon, or compromise the claims. 11 U.S.C. § 1141(c). This Court has not in any way encroached upon the jurisdiction of the District Court. Ownership of the District Court Action passed to the Liquidating Trustee when the debtors failed to stay consummation, and the Liquidating Trustee has stipulated to dismissal of the lawsuit. In doing so, the Liquidating Trustee was performing a condition precedent to the realization of significant benefits for the estates—the closing of the sale of the Project, the resultant infusion of millions of dollars of new cash, and the release of over $30 million of the Bank's cash collateral.

W. *Confirmation Requirements*

79. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

80. The debtors' plans failed to receive acceptance under 11 U.S.C. § 1126(c). I also conclude that the debtors' plans were not feasible because of the delays and contingencies inherent in both the Hadid contract and the attempt to subordinate the Bank's $240 million claim. Finally, the debtors' plans cannot be confirmed because of the Court's finding (Paragraph 28) that consummation likely would have been followed by liquidation or the need for further financial reorganization. 11 U.S.C. § 1129(a)(11).

81. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's plan as so amended was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15; 11 U.S.C. § 1126(c)). The Gould-affiliated Classes (7 through 9) rejected the Bank's plan.

82. The Bank's plan does not discriminate unfairly, and is fair and equitable with respect to each of the three classes that did not accept it. The Bank's plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's plan complies with the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, have been disclosed to the Court; there are no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's plan or (B) will receive or retain under the plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. Under the Bank's plan, all mechanics' lienors are paid in full, so the debtors' objections regarding the priority of such liens are moot.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections

507(a)(3), 507(a)(4), or 507(a)(5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a)(6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the Effective Date, equal to the allowed amount of such claim.

(i) At least one class of claims has accepted the Bank's plan, determined without including any acceptance of the plan by an insider holding a claim of such class.

(j) Confirmation of the Bank's plan is not likely to be followed by the liquidation, or the need for further financial reorganization, or the debtors or any successors to the debtors under the Bank's plan, except to the extent that liquidation or reorganization is proposed by the plan.

(k) With respect to the impaired classes and creditors that rejected the Bank's plan (MCJV, O&Y, the debtors, and the debtors' affiliates) and the requirement of Code Sections 1129(a)(8) and 1129(b), the Bank's plan does not discriminate unfairly and is fair and equitable with respect to each such impaired class of claims:

(1) Each holder of an impaired secured claim has retained the lien securing such claim, to the extent of the allowed amount of such claim, and will receive on account of the claim deferred cash payments totalling at least the allowed amount of the claim and of a value, as of the Effective Date, of at least the value of such holder's interest in the debtors' interest in such property.

(2) (A) Each holder of an impaired unsecured claim has received or retained on account of such claim property of a value, as of the Effective Date, equal to the allowed amount of such claim, or (B) the holder of any claim or interest junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's plan was and is entitled to confirmation.

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

See attached service list.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO.

TWIN DEVELOPMENT CORPORATION,

Plaintiff

v.

FRED STANTON SMITH, BANK OF NEW YORK,
and IRVING WOLFF,

Defendants

COMPLAINT
AND APPLICATION FOR PRELIMINARY
AND PERMANENT INJUNCTION

1. This is a civil action seeking declaratory, injunctive, and equitable relief, and damages. Plaintiff is a Virginia stock corporation with its principal place of business in Albemarle County, Virginia. Defendant Bank of New York is a corporation incorporated under the laws of the State of New York, with its principal place of business in the City of New York, and also doing business in Miami, Florida. Defendant Fred Stanton Smith is an individual citizen and resident of Miami, Florida. Defendant Irving Wolff is an individual citizen and resident of Miami, Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is based on 28 U.S.C. 1332.

2. Holywell Corporation, the sole record shareholder of Twin Development Corporation, also has its sole place of business in Albemarle County, Virginia.

3. On June 23, 1983, in accordance with the provisions of an assignment and security agreement, Holywell Corporation pledged to Bank of New York, as collateral for a loan by the Bank of New York to Chopin Associates and Miami Center Limited Partnership, all the shares of stock of Twin Development Corporation, as well as the shares of stock of other subsidiary corporations owned by Holywell Corporation (the "other subsidiaries"). By the terms of the agreement, Bank of New York's lien on the shares of stock of Twin Development Corporation and the other subsidiaries was to be extinguished upon the repayment of the loan.

4. Holywell Corporation subsequently transferred physical possession of the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries to Bank of New York.

5. On August 22, 1984, Holywell Corporation, Chopin Associates, Miami Center Limited Partnership, Miami Center Corporation and Theodore B. Gould filed related Chapter 11 petitions for reorganization with the United States Bankruptcy Court for the Southern District of Florida.

6. On August 8, 1985, the said Bankruptcy Court confirmed a Plan of Reorganization for the filed Debtors which provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code) to convey certain improved real property in Miami, Florida, to the Bank of New York, or its nominee, for a price of $255,600,000.00; said conveyance would result in satisfaction of the Debtors' indebtedness to the Bank of New York and the extinguishing of the above-mentioned liens on the stock of Twin Development Corporation and the other subsidiaries, all of which were non-filed, solvent corporations.

7. The said Bankruptcy Court appointed Fred Stanton Smith as the liquidating trustee and appointed Irving Wolff, Esquire, as the attorney for the liquidating trustee.

8. On October 10, 1985, Fred Stanton Smith, the liquidating trustee and one of the Defendants herein, conveyed the above-mentioned real property to the nominee of the Bank of New York, resulting in satisfaction of the Debtors' indebtedness to the Bank of New York.

9. Upon the transfer of the above-mentioned Miami real property to the nominee of the Bank of New York, the Bank of New York delivered to the said Irving Wolff, then attorney for the liquidating trustee, the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries, inasmuch as the conveyance of the Miami real property had released the Bank of New York's lien on the said shares of stock.

10. On May 15, 1987, the aforementioned Bankruptcy Court dismissed Irving Wolff as attorney for the liquidating trustee, and appointed Herbert Stettin, Esquire, as the new attorney for the liquidating trustee Fred Stanton Smith.

11. Defendant Fred Stanton Smith now asserts, through his new attorney Herbert Stettin, that the shares of stock of Twin Development Corporation and the other non-filed subsidiaries, and, through these shares, all of the assets, real and personal, of Twin Development Corporation and the other subsidiaries—all solvent corporations that were never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates—are the property of the liquidating trustee, who, not being a Bankruptcy Trustee, is not an officer of the court.

12. Defendant Fred Stanton Smith, through his new attorney Herbert Stettin, threatens to act by voting the shares of stock of Twin Development corporation and the other subsidiaries so as to create new Boards of Directors which will authorize the liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of

the proceeds from such liquidations into the liquidating trust controlled by Defendant Smith.

13. Under the Bankruptcy Code, the ownership of the stock of Twin Development Corporation and the other subsidiaries reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985.

14. Defendant Bank of New York wrongfully transferred the certificates representing the shares of Twin Development Corporation and the other subsidiaries to Defendant Irving Wolff, who was then attorney for the liquidating trustee, on October 10, 1985.

15. Defendant Fred Stanton Smith now wrongfully asserts that the shares of stock of Twin Development Corporation and the other subsidiaries are the property of the liquidating trustee, and threatens to immediately vote the said shares of stock so as to cause an immediate liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds of said liquidations into an account controlled by the liquidating trustee, Defendant Smith.

16. A liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations herein, is not authorized by the Bankruptcy Code.

17. The actions of the Defendants as set forth above represent part and parcel of a continuous pattern of conduct in which the liquidating trustee, to the extent of the validity of his appointment (which appears to be directly contrary to the provisions of the Bankruptcy Code), has disregarded the legitimate interests of the Plaintiff and the other subsidiaries of Holywell Corporation, said entities being solvent, non-

debtor corporations, and has breached his fiduciary duty to them as beneficiaries of the liquidating trust, causing substantial damage to the Plaintiff and the other subsidiaries. The said conduct of the Trustee has included, without limitation:

a. Failure and refusal to establish any reserve for the repayment to plaintiff of a super-priority loan approved by and ordered by the Bankruptcy Court to be paid with priority over all other creditors.

b. Failure and refusal to establish any reserve for the satisfaction of income tax liabilities of Plaintiff and the other non-debtor subsidiaries of Holywell Corporation, incurred as a result of the sale of assets of Plaintiff and the other non-debtor subsidiaries, a significant portion of the proceeds from such sales currently being in the possession of the liquidating trustee.

18. The wrongful actions of Defendant Bank of New York and Defendant Fred Stanton Smith, and the immediately threatened actions of Defendant Smith will, if unchecked, cause immediate irreparable harm to Plaintiff Twin Development Corporation, for which there is no immediately available adequate remedy at law.

WHEREFORE, Plaintiff Twin Development Corporation prays for the following:

1. A hearing on the corporation's application for a preliminary injunction enjoining Defendants Bank of New York, Irving Wolff, and Fred Stanton Smith from taking any action whatsoever with respect to the said shares of stock and/or assets of Twin Development Corporation or the other subsidiaries, and particularly enjoining Defendant Fred Stanton Smith from any efforts to assert his claimed right

to vote the shares of stock of Twin Development Corporation or the other subsidiaries in any fashion whatsoever, pending trial of this matter.

2. Judgment requiring Defendant Irving Wolff or any successor holder to deliver to the lawful officers of the Plaintiff all certificates representing the shares of stock in Twin Development Corporation and the other subsidiaries now wrongfully held by him, and a permanent injunction forever enjoining Defendants, or any of them, from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries, or, alternatively, a hearing, pursuant to 28 USC 2201 for a determination and declaration of the identity of the proper shareholders of Twin Development Corporation and the other subsidiaries.

3. Inasmuch as this is an action to quiet title to property whose situs is in this district, an order of this court pursuant to 28 USC 1655, directing the out-of-state Defendants named herein, namely, Bank of New York, Irving Wolff, and Fred Stanton Smith, to appear or plead in this matter by a day certain (such order to be served personally on the Defendants).

4. For damages in excess of $10,000.00.

5. And for such other and further relief as justice and equity may require.

Respectfully Submitted,

TWIN DEVELOPMENT CORPORATION

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SECTION 105 (11 US.C. §105)

§ 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

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SECTION 363 (11 U.S.C. §363)

§363. Use, sale, or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as

provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (c) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweights the detriment, if any, to such co-owners, and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or

financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

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SECTION 541 (11 U.S.C. §541)

§541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date.

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

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Rule 7052.

FINDINGS BY THE COURT

Rule 52 F.R. Civ. P. applies in adversary proceedings.

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Rule 9014.

CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

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RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

VI. TRIALS

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of

the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)